

LERT-Pre`97

Last Updated: January 20, 1998

All Substantive Orders Listed Sequentially
Newest Case First

(WCC DECISIONS IN BLUE)
(SUPREME COURT APPEALS AND DECISIONS COLORED
MAGENTA)

RAYMOND KUNTZ V. NATIONWIDE MUTUAL FIRE INS. CO.
WCC No. 9508-7378

AFFIRMED 1/13/98

KEY WORDS: *PERMANENT PARTIAL DISABILITY, *39-71-705 (1985), *CAUSATION,
*CREDIBILITY, *AGGRAVATION, *TREATING PHYSICIAN..

Supreme Court finds that WCC had substantial credible evidence to support its conclusion that claimant does not have a permanent partial disability due to a 1987 low back strain which he contended permanently and materially worsened his pre-existing low back condition. (Claimant suffered many injuries) SC relied on credibility conclusions of WCC Judge and it also upheld a conclusion based on the results of an IME rather than the treating physician. (*Kloepfer*, 276 Mont. at 497-98, 916 P.2d at 1311.)

[Findings of Fact, Conclusions of Law and Judgment \[11/19/96\]](#)

KEY WORDS: *PERMANENT PARTIAL DISABILITY, *39-71-705 (1985), *CAUSATION,
*CREDIBILITY, *AGGRAVATION.

Permanent partial disability benefits denied where claimant failed to persuade the Court that a 1987 low back strain permanently and materially worsened his pre-existing low back condition.

WILLIAM POLK V. PLANET INSURANCE COMPANY

WCC No. 9603-7525

REVERSED AND REMANDED (DECEMBER 30, 1997)

KEY WORDS: *CAUSATION, *CLEARLY ERRONEOUS, *39-72-408, *AGGRAVATION, *39-72-706(1), *BURDEN OF PROOF, *OCCUPATIONAL DISEASE, *OCCUPATIONAL DISEASE PANEL, *MEDICAL TESTIMONY, *JUDICIAL REVIEW, *SUBSTANTIAL EVIDENCE, *ERROR OF LAW.

Supreme Court “hold[s] that Polk **need not prove** that occupational exposures were the major or substantial factor causing his chronic pulmonary condition. Rather, Polk **must prove** that he is suffering from a disease that is **proximately caused** by his employment **or** that exposure to dust and other irritants while in the course of his employment at Koch **contributed to or aggravated a preexisting condition** .” (italics in original, bold added) WCC erred in reviewing only for clearly erroneous findings of fact, should have determined whether hearing examiners decision was affected by an error of law. Finally, when the standard of causation is changed to comport with this decision there is substantial evidence to find for the claimant as his occupation **substantially aggravated** Polk’s pulmonary condition. Claimant is entitled to pro rata compensation for his disease.

[Order Granting Motion to Amend & Denying Motion to Dismiss \[4/26/96\]](#)

KEY WORDS: *MOTION TO DISMISS, *PLEADING, *APPEAL.

Pleading styled as a “petition” will be treated as a notice of appeal where petitioner is in fact appealing a DLI decision. Petitioner’s notice concerning witnesses and exhibits will be ignored lacking leave of court to present additional evidence and an order remanding the case to the DLI for such evidence.

STEVEN K. BURGLUND V. LIBERTY MUTUAL NW INS.

WCC No. 9507-7342

AFFIRMED DECEMBER 16, 1997

KEY WORDS: *OCCUPATIONAL DISEASE, *CAEKAERT, *BURDEN OF PROOF, *AGGRAVATION, *NATURAL PROGRESSION .

Insurer failed to carry its burden of proving that claimant suffered from a subsequent occupational disease which materially or substantially worsened a preexisting condition which was the result of a prior industrial accident. Medical evidence supported WCC decision that the claimant’s condition was caused by a “natural progression” of his 1984 injury.

[Findings of Fact Conclusions of Law and Judgment \[8/29/96\]](#)

KEY WORDS: *OCCUPATIONAL DISEASE, *SUBSEQUENT DISEASE, *CAEKAERT, *LIBERTY NORTHWEST V. CHAMPION INTERN'L, *BURDEN OF PROOF, *AGGRAVATION.

Insurer failed to carry its burden of proving that claimant suffered from a subsequent occupational disease which materially or substantially worsened a preexisting condition which was the result of a prior industrial accident. Liability for original injury continues. Decision discusses prior cases and distinctions among them.

RUTH WIEGLEND v. STATE FUND
WCC No. 9506-7562

AFFIRMED 12/9/97- Slip Op. 97-045 NONCITEABLE

[Decision and Judgment \[10/23/96\]](#)

KEY WORDS: *CONSTITUTIONAL LAW, *EQUAL PROTECTION, *DUE PROCESS, *CRUEL AND UNUSUAL PUNISHMENT, *BRIEFS.

The 1993 legislation omitting benefits for maintenance and palliative medical does not violate equal protection and due process clauses and does not amount to cruel and unusual punishment. Claimant's brief did not cite relevant legal principles or cases. Future briefs of this nature will be returned to counsel.

LIBERTY NW INS. V. CHAMPION INT'L CORP.
WCC NO. 9601-7477

Liberty Northwest Ins. v. Stimson, _____ Mont. _____, _____ P.2d _____, _____ St.Rep. _____ (1997). Slip Op. 96-368 (10/10/97). **AFFIRMED.**

Supreme Court found that there was substantial evidence to support the WCC's finding that the claimant's work for Stimson (insured by Liberty) accelerated and significantly aggravated his preexisting degenerative disk disease and further that claimant's disability was not the result of a natural progression of his underlying condition.

WCC did not misapply *Caekaert* decision. Further WCC had found claimant to be "truthful".

[Findings of Fact Conclusions of Law and Judgment \[6/25/96\]](#)

KEY WORDS: *CAEKAERT, *LAST INJURIOUS EXPOSURE, *OCCUPATIONAL DISEASE, *SUBSEQUENT INJURY, *AGGRAVATION.

Insurer at risk during claimant's subsequent employment liable for his back condition where evidence establishes that the back condition, which was the result of a prior

industrial accident, was materially and significantly aggravated by claimant's work at the subsequent employer, thus qualifying claimant for occupational disease benefits.

[Order Denying Summary Judgment \[3/27/96\]](#)

KEY WORDS: *INDEMNIFICATION, *NOTICE, *39-71-608, *ACCEPTANCE OF LIABILITY, *SUMMARY JUDGMENT

Insurer not required to pay benefits under an express reservation of rights as a prerequisite to seeking indemnification from a second insurer. Motion for summary judgment based on the petitioning insurers acceptance of liability is therefore denied.

LINDIA GROOMS v. PONDEROSA INN

WCC No. 9603-7523

Grooms v. Ponderosa Inn, __ Mont. __, __ P.2d __, __ St. Rep. __ (1997) .
AFFIRMED 7/15/97

KEY WORDS: *OCCUPATIONAL DISEASE ACT, *OCCUPATIONAL DISEASE MEDICAL PANEL, *TREATING PHYSICIAN, *CONSTITUTIONAL LAW, *DUE PROCESS,

*EQUAL PROTECTION, *RIGHT TO HEARING, *LEGAL REDRESS.

Medical panel procedures under the Occupational Disease Act, including requirement that party asking for a second examination pay for it, are constitutional. All aspects of the WCC decision affirmed.

[Order and Judgment \[7/16/96\]](#)

KEY WORDS: *OCCUPATIONAL DISEASE ACT, *OCCUPATIONAL DISEASE MEDICAL PANEL, *MEDICAL PANEL, *TREATING PHYSICIAN, *CONSTITUTIONAL LAW,

*DUE PROCESS, *EQUAL PROTECTION, *RIGHT TO HEARING.

Medical panel procedures under the Occupational Disease Act, including requirement that party asking for a second examination pay for it, are not unconstitutional. Claimant could have requested a hearing without a second exam and was free to present other medical evidence. A panel physician is not a treating physician.

SAMUEL J. GRENZ V. FIRE & CASUALTY OF CONNECTICUT

WCC NO. 9701-7693

[Order On Appeal \[7/7/97\]](#)

KEY WORDS: *RES JUDICATA, *CLAIM, *INJUNCTION.

Department of Labor decision dismissing the latest of Grenz's claims on res judicata grounds is reversed where the specific issue raised by Grenz -- whether his 1984 injury claim also constituted a claim for occupational disease benefits -- has never been addressed by the Department or a Court. Remanded for consideration of other defenses, including whether the 1984 claim sets forth sufficient information to state a claim under the ODA. Also remanded for reconsideration of the Department's order prohibiting further filings.

Grenz v. Fire & Casualty of Conn., ____ Mont. ____, ____ P.2d ____, 53 St. Rep. 89 (1996) **AFFIRMED 9/17/96.**

KEY WORDS: *STATUTE OF LIMITATIONS, *OCCUPATIONAL DISEASE, *NOTICE, *39-72-403 (1985), *SUBSTANTIAL EVIDENCE

Supreme Court, agreeing with WCC and DLI hearing examiner, determines that Grenz knew or should have known prior to 1988 that his total disability was caused by an occupational disease. Refuses to consider argument which is made for the first time on appeal.

[Order Denying Motion for Trial/Reconsideration \[9/13/95\]](#)

KEY WORDS: NEW TRIAL, RECONSIDERATION.

Motion for reconsideration/new trial denied. Grenz does not pursue request to present additional evidence, ARM 2.52.350(4). His presents no reasonable excuse for his failure to present the evidence he now wants to submit. Additional grounds asserted were never briefed or raised and will not be considered now

[Decision on Appeal \[8/24/95\]](#)

KEY WORDS: *OCCUPATIONAL DISEASE, *STATUTE OF LIMITATIONS.

Decision of Department of Labor denying claimant's occupational disease claim as time-barred affirmed where more than two years prior to filing his claim the claimant should have known that he was suffering from an occupational disease.

EBI/ORION GROUP V. MICHAEL S. BLYTHE

WCC No. 9407-7089

[Findings of Fact, Conclusions of law and Judgment on Remand \[6/20/97\]](#)

KEY WORDS: *MALINGER, *CREDIBILITY, *REWEIGH EVIDENCE, *REMAND

Supreme Court ordered a reweighing of the evidence as to malingering; contrasting the testimony of claimant's experts, including Dr. Stratford, with the testimony of the insurer's remaining expert, Dr. Faust. Court found that its function is not as limited as suggested by the Supreme Court. Resolution of the claim requires that I consider claimant's

credibility. After factoring out the testimony of the psychologist, the evidence supports a finding that claimant is a malingerer. Claimant was neither credible nor truthful. Dr. Stratford lost his objectivity concerning the claimant. Dr. Faust, on the other hand, impressed and persuaded the Court. Claimant is not suffering from a schizoaffective disorder or any other psychotic diagnosis.

EBI/ORION GROUP v. BLYTHE, ____ Mont. ____, ____ P.2d ____, ____ St. Rep. ____ (1996). **REVERSED AND REMANDED - JANUARY 7, 1997**

KEY WORDS: *PSYCHOLOGICAL CONDITIONS, *MALINGERING, *INDEPENDENT MEDICAL EXAMINATION, *TREATING PHYSICIAN, *39-71-605, *39-71-116(30).

Supreme Court finds Workers' Compensation Court erred in ordering an independent medical examination by a psychologist who is neither a physician nor licensed to practice in the State of Montana. Remanded for new findings and conclusions which do not consider the testimony and evidence of the IME.

Findings of Fact, Conclusions of Law and Judgment [2/08/96]

KEY WORDS: *PSYCHOLOGICAL CONDITIONS, *MALINGERING, *PERMANENT TOTAL DISABILITY.

Claimant was stuck six years prior by an AIDS infected needle but did not contract HIV or AIDS. However, he claims that the incident precipitated disabling psychosis and depression. The Court finds that his mental illness is malingered. His claim for further disability benefits is denied.

Order for Independent Medical Exam [6/6/95]

KEY WORDS: *INDEPENDENT MEDICAL EXAMINATION, *PHYSICIANS, *39-71-605, *RULE 35, MONT.R.CIV.P.

Although the Court's rules contain no express provision for an IME, the Court may order an IME pursuant to section 39-71-605, MCA, which entitles an insurer to an IME at any time. In a case involving alleged mental disability, a Ph.D. psychologist may be considered a "physician" for purposes of the IME statute. Claimant's allegation any exam would be invalid because he is taking anti-psychotic drugs is unsupported by any evidence. Exam ordered.

Order Compelling Production of Military Records [6/1/95]

KEY WORDS: *DISCOVERY, *PRODUCTION, *MEDICAL RECORDS, *MILITARY RECORDS

Where claimant is claiming he is psychologically disabled on account of his industrial

injury,
military records containing psychological evaluation and information are discoverable even though twenty years old.

GERALD MADILL v. STATE FUND

WCC No. 9506-7320

Judgment Awarding Attorney Fees [5/28/97]

KEY WORDS: *ATTORNEY FEES, *REMAND.

Attorney fees and costs awarded pursuant to Supreme Court remand. Petitioner's request for attorney fees with respect to his efforts to secure attorney fees denied since they are not within the scope of the Supreme Court decision and are in any event not authorized by statute, 37-71-612 (1979).

Madill v. State Compensation Insurance Fund, ____ Mont. ____, ____ P.2d ____, ____ St. Rep. ____ (1996) January 2, 1997. **REVERSED AND REMANDED.**

Treiwieler, Dissent - Gray

KEY WORDS: *ATTORNEY FEES, *39-71-612(1979)

Supreme Court determines that there is an entitlement to attorney fees per §39-71-612(1979) when the parties reach a settlement of disputes even though the dispute was not resolved by the Workers' Compensation Court. Further, *Lasar*, *Komeotis* and *Field* are overruled to the extent that they "have ignored the plain language in § 39-71-612, MCA (1979), which provides for an award of attorney fees and costs where there is a controversy regarding the amount of compensation due, and where the "settlement" is greater than the amount paid or tendered..."

ORDER ON APPEAL [1/11/96]

KEY WORDS: *ATTORNEY FEES.

Appeal from DLI. Held: Claimant not entitled to reimbursement for attorney fees where, without petition or trial, insurer converted benefits from permanent partial to temp total and then to perm total upon receipt of additional information and claimant dropped lump-sum conversion petition and insurer then quickly agreed to partial lump sum advance. DLI affirmed.

JOE YARBOROUGH v. MMIA/CITY OF BILLINGS

WCC No. 9505-7309

Yarbough v. MMI, ____ Mont. ____, ____ P.2d ____, ____ St. Rep. ____ (1997). **AFFIRMED 5/20/97**

KEY WORDS: *INJURY, *MENTAL STRESS, *PTSD, *39-71-119(1987), *STRATEMEYER, *MEDICAL EVIDENCE.

Affirmed WCC's conclusions. SC relies in part on expert medical testimony.

[Findings of Fact Conclusions of Law and Judgment \[6/28/96\]](#)

KEY WORDS: *INJURY, *MENTAL STRESS, *PTSD, *39-71-119.

Disabling psychological injury not compensable where it is not the result of physical injuries. In this case the claimant suffered PTSD from the shock of an explosion. He suffered minor burns but the fear or psychological shock of the incident, not the burns, were the cause of his PTSD.

DARWIN ZEMPEL v. UNINSURED EMPLOYERS' FUND

WCC No. 9510-7408

Zempel v. UEF, _____ Mont. _____, _____ P.2d _____, _____ St. Rep. _____ (1997) **AFFIRMED 5/15/97.**

KEY WORDS: *EQUAL PROTECTION, *INDIANS, *JURISDICTION, *RIGHT OF REDRESS, *UNINSURED EMPLOYERS' FUND, *39-71-501(1991), *CONSTITUTIONAL, *RATIONAL BASIS TEST, *ARTICLE XII, SECTION3(3).

Workers' Compensation Court did not err in concluding that Zempel was not denied equal protection under 39-71-501, as applied. Zempel may not have judicial access under the WC Act, but is not precluded from pursuing non-Act claims against the employer. Lack of coverage due to fact that injury occurred on the reservation while working for a tribally-owned business, not unconstitutional under equal protection clause or right of access to courts.

[Declaratory Judgment \[2/21/96\]](#)

KEY WORDS: *COMITY, *EQUAL PROTECTION, *INDIANS, *JURISDICTION, *RIGHT OF REDRESS, *UNINSURED EMPLOYERS' FUND.

Business owned by enrolled tribal member and operated solely on the Flathead Reservation is not required to carry workers' compensation insurance for its employees. UEF not liable for injured worker since such employer not uninsured within meaning of Act. Such lack of coverage not unconstitutional under equal protection clause or right of access to courts.

ALEXANDRA ENGLER HAMMER V. UEF

WCC No. 9508-7374

Hammer v. UEF, _____ Mont. _____, _____ P.2d _____, _____ St. Rep. _____ (1996) **AFFIRMED 12/27/96.**

KEY WORDS: *EMPLOYEE, *EXEMPT EMPLOYEE, *STEPCHILD, *AID AND SUSTENANCE, *CREDIBILITY, *39-71-401(2)(h).

Supreme Court found claimant's employment to be under the exception in §39-71-401(2)(h). Deferred to WCC for credibility issue.

[FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT \[5/31/96\]](#)

KEY WORDS: *EMPLOYEE, *EXEMPT EMPLOYEE, *STEPCHILD, *AID AND SUSTENANCE.

While an employee, claimant was exempt from the coverage of the WCA because she was working only for aid and sustenance. Another exemption for dependents was not applicable since she was not a step-child of the employer and did not principally reside in his household during the year in which the accident occurred.

JOSEPH EVANS V. UEF
WCC NO. 9502-7453

Joseph Evans v. UEF, Slip Op. _____. AFFIRMED 12/17/96, NONCITEABLE.

[Findings of Fact, Conclusions of Law and Judgment \[5/30/96\]](#)

KEY WORDS: *LUMP SUM CONVERSION, *ANNUITY, *LIFE EXPECTANCY.

Claimant not entitled to lump sum conversion where he provided no documentation concerning his expenditures and was not a credible witness and where he had received and dissipated an advance made 18 months earlier. Intended use of a portion of the request to buy an annuity is not a proper purpose for a conversion. Claimant's life style also raises issues concerning his life expectancy.

COLLEEN CONNERY V. LIBERTY NORTHWEST INSURANCE CORP.
WCC No. 9602-7507

Connery v. Liberty Northwest Ins. Corp., ____ Mont. ____, ____ P.2d ____, ____ St. Rep. ____ (1996). AFFIRMED 12/10/96 .

KEY WORDS: *COURSE AND SCOPE, *COURSER, *RECREATIONAL ACTIVITY, *SKIING, *39-71-118(2).

[Findings of Fact Conclusions of Law and Judgment \[7/22/96\]](#)

KEY WORDS: *COURSE AND SCOPE, *COURSER, *RECREATIONAL ACTIVITY, *SKIING, *39-71-118(2).

Recreational activity exclusion is inapplicable where a ski instructor is injured during a warm-up ski run recommended by her employer even though she was not paid for the warm up. The exclusion applies only where a claimant is relieved of and not performing

duties of employment. Under traditional course and scope principles, the recommended warm up was a duty of employment.

CATHERINE E. SATTERLEE v. BUTTREY
WCC No. 9502-7230

Satterlee v. Buttrey, _____ Mont. _____, _____ P.2d _____, _____ St. Rep. _____ (1996)
AFFIRMED, IN PART, REVERSED IN PART AND REMANDED 12/10/96.

[Order Denying Post-trial Motions \[2/23/95\]](#)

KEY WORDS: *PAIN, *PERMANENT TOTAL DISABILITY

WCC notes that contrary to assertion by claimant it did believe the her reports of pain, however 39-71-703(2) requires a preponderance of medical evidence that the disabling pain is a result of the injury and not subsequent factors.

[Findings of Fact, Conclusions of Law and Judgment \[1/25/96\]](#)

KEY WORDS: *MEDICAL PROOF, *PAIN, *PROXIMATE CAUSE, *PERMANENT TOTAL DISABILITY, *AGGRAVATION.

Although permanently totally disabled for other reasons, claimant is not permanently totally disabled on account of her 1992 industrial accident. Law in effect at time of her injury requires that a finding of permanent total disability be supported by a preponderance of medical evidence. In this case no doctor opined that she is unable work on account of the industrial industry.

HARRY NESS v. ANACONDA MINERALS
WCC No. 8906-5395

Ness v. Anaconda Minerals Company, 53 St. Rep.1241. **AFFIRMED 11/25/96.**
KEY WORDS: *SUBROGATION, *ATTORNEY FEES

Supreme Court makes it clear that *Brandner* and *Getten* and their progeny are expressly overruled to the extent that the “issue of whether a claimant has been made whole is a matter of law.” It is a question of fact. Affirms WCC’s holding of entitlement to attorney fees and the notice issue.

[Order and Final Judgment \[12/29/95\]](#)

KEY WORDS: *SUBROGATION.

Settlement within policy limits does not as a matter of law establish amount which will make claimant whole for purposes of determining insurers subrogation interest. In this case, third-party settlement reflected serious liability issue and did not fully compensate

claimant for his injuries. Insurer not entitled to subrogation even though settlement within policy limits.

[Decision Granting Partial Summary Judgment](#) [2/3/95]

KEY WORDS: *ATTORNEY FEES, *COLES, *REMAND, *TEMPORARY TOTAL DISABILITY.

Partial decision on remand from the Supreme Court. Adhering to the Supreme Court instructions concerning remand, the claimant is entitled to temporary total disability benefits only until the date on which the fourth *Coles'* factor was met, which was on September 11, 1989. He is also entitled to a 40% attorney fee.

DEBORAH (EVANS) BRIAN V. STATE COMPENSATION INS. FUND
WCC No. 9609-7620

[Findings of Fact, Conclusions of Law and Judgment \[11/22/96\]](#)

KEY WORDS: *AGGRAVATION, *MEDICAL OPINIONS, *REASONABLE MEDICAL EXPENSES.

Industrial accident which worsened claimant's pain and prevented her from returning to work is aggravation of preexisting back condition. Insurer liable for back surgery even though surgery was recommended prior to the industrial accident. Industrial accident made the case for surgery more compelling and current condition now totally disabling, where it was not disabling prior to the IA. Fees, costs, and penalty awarded. Insurer unreasonably required objective physical worsening of condition.

STEVEN K. BURGLUND v. LIBERTY MUTUAL NW/UPS
WCC No. 9303-6721

Burglund v. Liberty Mutual Insurance Company, 53 St. Rep. 1158. **AFFIRMED 11/21/96.**

KEY WORDS: *39-71-703 (1983), *SUBSTANTIAL EVIDENCE, *LOSS OF EARNING CAPACITY, *NEW TRIAL, *39-71-705-708, *INDEMNITY BENEFITS.

Supreme Court affirms the WCC's interpretation of law in denying claimant benefits under 39-71-703 and granting benefits per 39-71-705-708. Also, WCC did not abuse discretion in not granting a new trial.

[Order Granting Stay of Execution \[6/5/95\]](#)

KEY WORDS: *STAY OF EXECUTION, *39-71-2910, *RULE 7(B), *MONT.R.APP.P.

Stay of execution of judgment granted even though claimant filed affidavit indicating that he has sufficient equity in house and personal property to repay benefits if judgment reversed on appeal. Purpose of stay.

[Order Denying Petition for New Trial \[5/1/95\]](#)

KEY WORDS: *NEW TRIAL.

The Court has jurisdiction to consider subsequent changes in a claimant's disability. However, the Court cannot go back and retry a matter simply because there have been subsequent developments. The developments set forth in the PETITION FOR TRIAL may well indicate a change in claimant's condition and his disability. Petitioner's remedy is to file a new petition.

[Amended Findings of Fact, Conclusions of Law and Judgment \[4/10/95\]](#)

KEY WORDS: *LOSS OF EARNING CAPACITY, *INDEMNITY AWARD, *IMPAIRMENT

RATING, *RELATEDNESS, *CAUSATION.

Claimant's current condition is due to 1984 industrial accident. Claimant suffered no lost earning capacity but is entitled to 20% indemnity award for 1984 industrial accident based on 10% impairment and other factors. Attorney fees and costs awarded.

[Order Withdrawing Findings of Fact, Conclusions of Law and Judgment \[3/1/95\]](#)

KEY WORDS: *MEA CULPA, *NEW TRIAL, *AMENDED FINDINGS (SEE NEW TRIAL), *RECONSIDERATION.

Decision applying section 39-71-705, MCA (indemnity award) withdrawn where Court overlooked the parties' stipulation that the case should be considered under section 39-71-703, MCA, (loss of earning capacity). The Court also overlooked the fact that the insurer had paid the full amount of an impairment award. The oversight requires reconsideration of the penalty awarded to claimant.

[Findings of Fact, Conclusions of Law and Judgment \[1/19/95 ORDER WITHDRAW N 3/1/95.](#)

AMMIE L. COATES V. LIBERTY NORTHWEST INS. CORP.

WCC No. 9606-7555

[Findings of Fact, Conclusions of Law and Judgment \[11/18/96\]](#)

KEY WORDS: *CREDIBILITY, *MAXIMUM MEDICAL HEALING, *MEDICAL EVIDENCE.

Claimant not temporarily totally disabled and not entitled to further benefits. She has no objective medical findings and her testimony concerning pain was not credible.

JAMES MAJOR V. STATE COMPENSATION INS. FUND

WCC No. 9606-7564

[Partial Summary Judgment Order \[11/15/96\]](#)

KEY WORDS: *STATUTORY INTERPRETATION, *WAGE SUPPLEMENT BENEFITS, *PERMANENT PARTIAL DISABILITY BENEFITS, *39-71-118 (1989), *39-71-703 (1989).

Partial summary judgment determining that for purposes of computing wage supplement benefits under §39-71-703(b)(i) (1989), the wage elected by a sole proprietor pursuant to § 39-71-118(2) is the time-of-injury "actual wages."

ELIZABETH KUZARA v. SPRING CREEK COAL CO

WCC No. 9502-7246

Kuzara v. State Compensation Insurance Fund. 53 St.Rep. 1125.

REVERSED/REMANDED 11/14/96.

KEY WORDS: *ESTOPPEL, *NOTICE, *BURDEN OF PROOF, *39-71-603

Supreme Court determines that the WCC misapprehended evidence as presented by claimant during case in chief and that there was sufficient evidence of notice to her employer. Case remanded to allow insurer opportunity to rebut evidence. Further, SC states that unless “rebutted” by substantial credible evidence equitable estoppel may be proper.

[Judgment \[11/27/95\]](#)

KEY WORDS: *DIRECTED VERDICT, *NOTICE, *39-71-603, *MOORE V. STATE FUND, *ACCIDENT DEFINITION.

Judgment entered for insurer on directed verdict. Claimant’s own testimony showed that her notice to her employer concerning an alleged injury was insufficient under section 39-71-603, MCA, because it failed to identify any specific time and incident. Moreover, but not decided, her description of her alleged injury makes it doubtful that an industrial accident (within the meaning of the Act) occurred.

[Order Vacating Trial and Compelling Discovery \[01/26/96\] 96\]](#)

KEY WORDS: *CONTINUANCE, *DISCOVERY, *EXPERT WITNESSES.

Insurer’s motion for continuance granted where claimant provided inadequate disclosure concerning expert witnesses. Designating the general topic of testimony doesn’t cut it. The ultimate opinions and factual basis must be disclosed in accordance with the scheduling order. Counsel in this case have waited until the last minute to put their cases together.

GREEN V. ST. PAUL FIRE & MARINE

WCC No. 9504-7273

[Judgment \[11/12/96\]](#)

KEY WORDS: *FULL AND FINAL COMPROMISE SETTLEMENT, *JUDGMENT BY STIPULATION

WCC enters judgment based on JUDGMENT BY STIPULATION of the parties, incorporating terms and conditions of the petition for a full and final settlement.

JOHN RAYMOND CATTANEO V. LIBERTY MUTUAL FIRE INS. CO.

WCC No. 9602-7506

[Findings of Fact, Conclusions of Law and Judgment \[11/4/96\]](#)

KEY WORDS: *39-71-116(18) (1995), *MEDICAL BENEFITS, *PERMANENT PARTIAL DISABILITY.

Vitamins and blender are reasonable medical expenses where claimant suffered severely fractured jaw and doctor prescribed soft and liquid diet. However, claimant suffered no permanent partial disability since he returned to his time-of-injury job without medical restrictions.

CHAMPION INTERNATIONAL CORP. V. CHOM ROBERTSON
WCC No 9511-7423

[Order Adopting Arbitration Award \[9511-7423\]](#)

KEY WORDS: *ARBITRATION,

Following a Voluntary Arbitration between the Court hearing examiner and the parties, an order of the Court finalizes agreement.

PHIL WALLING V. ARGONAUT INSURANCE
WCC No. 9603-7515

[Findings Of Fact, Conclusions of Law and Judgment \[10/28/96\]](#)

KEY WORDS: *CREDIBILITY

Claimant alleged a back injury in an unwitnessed accident. The lack of a witness is not significant. However, in this case the Court did not believe the claimant. Serious credibility issues were resolved against him, against the background of prior back claims, a prior settlement, a lack of regular employment, and a motive for a new claim.

[Order Vacating Trial \[6/12/96\]](#)

KEY WORDS: *DISCOVERY,* CONTINUANCE

Trial setting vacated where petitioner failed to respond to discovery for more than 60 days. His argument that the requested information is "irrelevant" and the trial should therefore proceed is without merit. If the discovery was irrelevant then he should have timely responded to the requests and set forth his objections. He cannot stonewall discovery and insist on going to trial.

JAMES TUMA v. CONN. INDEMNITY CO.
WCC NO. 9607-7573

[Order Compelling Discovery and Vacating Deposition \[10/16/96\]](#)

KEY WORDS: *DISCOVERY, *PRODUCTION, *PRIVILEGE, *53-24-306.

Production of medical records ordered where relevant to medical condition at issue and even though not now in claimant's possession. By putting medical condition in issue, claimant has waived any claim of privilege. His medical records are in his control and he must obtain and furnish them to the insurer.

JAMES P. SMITH V. NATIONAL UNION FIRE INS. CO.

WCC No. 9307-6858

[Partial Summary Judgment \[10/15/96\]](#)

KEY WORDS: *39-71-603, *39-71-606, *ACCEPTANCE, *HAAG, *NOTICE, *SUMMARY JUDGMENT.

Pursuant to *Haag*, an insurer's failure to deny a claim within 30 days amounts to an automatic acceptance of the claim and cuts off any defense based on the employee's failure to notify his employer of his accident within 30 days. Fact issues remain in case. Partial summary judgment for Smith.

[Order Denying Motion For Default \[6/3/94\]](#)

KEY WORDS: *DEFAULT, *SANCTIONS, * ATTORNEY FEES, * 24.5.326.

Denied Insurer's motion for default due to claimant's failure to appear at deposition. Claimant accepted responsibility for failure to appear and asked not to be defaulted. Sanction: attorney fees and costs incurred by insurer.

[Order Regarding Discovery Motions \[2/3/94\]](#)

KEYWORDS: *DISCOVERY, *DEPOSITION, *RULE 804, *MOTION TO COMPEL.

Deposition from prior proceeding not admitted as it does not satisfy criteria of Rule 804..

DANIELA BLOWERS V. MT INSURANCE GUARANTY ASSOC.

WCC No. 9412-7192

[Partial Summary Judgment \[10/15/96\]](#)

KEY WORDS: *39-71-721(1985), *39-71-741 (1985), *DEATH BENEFITS, *FEASIBILITY STUDIES, *JURISDICTION LUMP SUM,*WIDOW

Widow not limited to lump summing only 2 years of death benefits but two-year limitation of benefits upon remarriage is a significant factor which must be considered by the Court in any award. When petition requests lump sum, Court has jurisdiction to order insurer to pay for feasibility studies.

[Order Joining Additional Party, Requiring Guardian Ad Litem, Requiring Parties to File Report with Court, and Vacating Trial Setting \[2/28/95\]](#)

KEY WORDS: *LUMP SUM, *GUARDIAN AD LITEM.

Petitioner seeks a lump-sum conversion of future death benefits on her own behalf and on behalf of her minor son. The Court determined the minor child should be represented by a guardian ad litem, *Hock* (1981), and that petitioner must present the respondent and the Court with an economic justification for conversion of death benefits.

CLINTON LOSS V. LUMBERMENS MUTUAL CASUALTY CO.

WCC No. 9609-7607

Loss v. Lumbermens Mutual Casualty Co., ____ Mont. ____, ____ P.2d ____, ____ St. Rep. ____ (1997) **AFFIRMED 3/27/97**

KEY WORDS: *39-71-2001 (1991), *REHABILITATION BENEFITS, *STATUTORY INTERPRETATION, *OCCUPATIONAL DISEASE

Affirmed WCC's conclusions.

[Summary Judgment](#) [10/11/96]

KEY WORDS: *39-71-2001 (1991), *REHABILITATION BENEFITS, *STATUTORY INTERPRETATION

Rehabilitation benefits provided by the 1991 legislature are not available under the Occupational Disease Act. The legislature expressly provided that the benefits be a part of the Workers' Compensation Act and made no provision for making them available under the ODA.

RICHARD C. KLIMEK V. STATE FUND

WCC No. 9602-7492

[Order and Partial Summary Judgment](#) [10/11/96]

KEY WORDS: *39-71-606, *HAAG, *LACHES, *RETROACTIVITY.

Haag decision, which holds that the failure of an insurer to deny a claim within 30 days is automatic acceptance of the claim, applies retroactively. Recent precedents *sub silentio* overrule prior precedents regarding retroactivity. Laches is inapplicable since claimant was not negligent in failing to bring case earlier. Partial summary judgment to claimant.

THEDA BEA BOULDIN V. LIBERTY NORTHWEST INS.

WCC No. 9604-7536

[Partial Summary Judgment and Decision](#) [10/8/96]

KEY WORDS: *ACCEPTANCE, *AFFIRMATIVE DEFENSE, *CONFLICTING MEDICAL OPINION, *JURISDICTION, *OCCUPATIONAL DISEASE.

An insurer bound by its acceptance of an occupational disease claim. Conflicting medical opinions regarding causation is not a sufficient basis to relieve an insurer of liability for the condition which it has accepted as compensable. Court has jurisdiction to determine whether claim accepted or denied.

LINDA MILLER V. MAURINE FRASURE

WCC No. 9110-6271

APPEALED 10/10 /96/ CROSS-APPEALED 10/17/96 - DISMISSED W/PREJUDICE

[Order Granting Additional Costs; Order Denying Motion to Amend Findings of Fact, Conclusions of Law and Judgment \[9/10/96\]](#)

KEY WORDS: *AMENDED FINDINGS, *COSTS

Additional costs awarded where Court overlooked them in its initial cost award. Motion to amend findings of fact denied where no new matter presented and insurer simply arguing with the Court over its findings.

[Order Awarding Attorney Fees and Costs \[7/29/96\]](#)

[Findings of Fact, Conclusions of Law and Judgment on Remand \[7/29/96\]](#)

KEY WORDS: *LOSS OF EARNING CAPACITY, *39-71-703 (1983), *ATTORNEY FEES, *COSTS

On remand, permanent partial benefits, attorney fees and costs awarded.

CAROL ANN CARRILLO v. BCBS

WCC No. 9410-7155

Carrillo v Liberty Northwest Insurance, 53 St.Rep. 829. **REVERSED/REMANDE D 9/3/96.**

KEY WORDS: *COURSE AND SCOPE, *39-71-407(1), *39-71-407(3), *BREAK AUTHORIZED, *39-71-407(3), *FIRST IMPRESSION,

Supreme Court determines that claimant was on "break" when injured, breaks are provided by the employer and are not a departure from work time, her activity during the break did not constitute a personal deviation, therefore she was injured while working. WCC erred in applying

[Findings of Fact, Conclusions of Law and Judgment \[8/14/95\]](#)

KEY WORDS: *TRAVEL, *COURSE AND SCOPE, *39-71-407(1), *39-71-407(3), *COURSER V. DARBY SCHOOL DIST. #1

Employee not in course and scope of employment where she left employer's premises to

look for gift for departing co-employee. Specific travel criteria of 39-71-407(3) applied.

EDWARD KILLOY, JR. v. RELIANCE NAT'L INDEMNITY

WCC No. 9506-7322

Killoy v. Reliance National Indemnity, 53 St. Rep. 838. **REVERSED/REMANDE D 9/3/96.**

KEY WORDS: *SUBSTANTIAL EVIDENCE, *PAIN

Supreme Court finds that testimony at trial supported a finding that the claimant would be unable to work at any of the identified jobs and that the WCC did not have substantial evidence to find otherwise. Claimant's testimony regarding his pain was supported by Dr. Dewey.

[Order Denying Motion for Rehearing and to Amend](#) [11/28/95]

KEY WORDS: *CREDIBILITY, *PAIN, *NEW TRIAL, *AMENDED FINDINGS.

Petition for rehearing or to amend denied. Claimant's argument that the Court must as a matter of law accept his testimony that his pain precludes him from working is rejected.

[Findings of Fact, Conclusions of Law and Judgment](#) [11/7/95]

KEY WORDS: *BURDEN OF PROOF, *PAIN, *PERMANENT TOTAL DISABILITY, *MEDICAL PROOF, *39-71-702(2).

Claimant's request for permanent total disability benefits denied where treating physician approved five jobs but left it to claimant to determine, based on his pain, whether he could work. Physical requirements of three jobs would increase his pain beyond tolerance, but two jobs would only make him "cranky." He could probably perform the two jobs part-time and certainly full-time.

MARGARET EPPERSON v. WILLIS CORROON ADMIN. SERVICES

WCC No. 9606-7558

AFFIRMED 3/10/97.

[Order on Appeal](#) [8/29/96]

KEY WORDS: *39-72-612, *REQUEST FOR HEARING, *TIME FOR REQUESTING HEARING, *TIME BARRED, ARM *24.29.205, *24.29.206, *24.29.207, *24.29.215.

Twenty day period to request hearing in occupational disease case runs from the time of a **final** order. Since Department's rules allow for informal "administrative review" of OD determination order, which may change the order, the order is not final until the time for such review has expired. Thus request filed in 90 days is timely. Remanded for hearing.

SHIRLEY RANES V. LUMBERMENS

WCC No. 9505-7294

[Amendment to Judgment \[8/26/96\]](#)

The July 5, 1996 Findings of Facts, Conclusions of Law and Judgment are amended to reflect that the insurer is not entitled to a credit for the permanent partial benefits already paid claimant.

[Findings of Fact Conclusions of Law and Judgment \[7/5/96\]](#)

KEY WORDS: *TEMPORARY TOTAL DISABILITY, *CARPAL TUNNEL SYNDROME, *PENALTY, *ATTORNEY FEES, *COLES, *DUTIES OF CLAIMANT.

Claimant entitled to retroactive TT benefits where unable to perform modified job and she had not reached MMI. Coles inapplicable since claimant failed to show she had no reasonable prospect of employment in normal labor market. Claimant not entitled to double TT benefits for separate OD. She has a duty to undertake reasonable medical treatment. No penalty or fees.

KEITH HART V. STATE FUND

WCC No. 9607-7571

[Order Dismissing Appeal \[8/26/96\]](#)

KEY WORDS: *JUDICIAL REVIEW, *RIGHT TO HEARING, *JURISDICTION, *39-71-601, *CONTESTED CASE, *ADMINISTRATIVE PROCEDURE, *39-71-204.

Appeal from DLI denial of request for extension of time to file claim is premature where a hearing is still available at DLI. Factual and legal issues must be finally resolved by DLI prior to any appeal.

STEVEN J. GERHARDT V. DON FRANZ CONT.

WCC No. 9604-7528

[Order Denying Motion to Dismiss \[8/1/96\]](#)

KEY WORDS: *ATTORNEY FEES, *JURISDICTION, *MINTYALA, *PENALTY.

WCC has jurisdiction to award a penalty and attorney fees despite insurer's payment of requested benefits before trial. *Mintyala*, 917 P.2d 422 (Mont. 1996) followed. MOTION TO DISMISS denied.

SONJA KING v. SUPER 1 FOODS
WCC No. 9602-7490

King v. Super 1 Foods, ____ Mont. ____, ____ P.2d ____, ____ St. Rep. ____ (1997)
AFFIRMED 4/29/97

KEY WORDS: *WAGES, 39-71-123, (1991), 39-71-105, MCA, (1991)

Wages must be calculated based on four preceding pay periods. Cannot use three preceding weeks simply because that during earliest pay period claimant worked fewer hours. Also, cannot use post-injury wages.

[Findings of Fact Conclusions of Law and Judgment \[7/16/96\]](#)

KEY WORDS: *WAGES.

Wages for purposes of determining benefits rates do not include post-injury wages.

JIM DAENZER v. STATE FUND
WCC No. 9604-7534

[Order Denying Motion to Dismiss \[7/16/96\]](#)

KEY WORDS: *JURISDICTION, *39-71-415, *39-71-405, *HUNT.

Workers' Compensation Court has jurisdiction to consider employer's claim that a worker's injury did not occur in the scope and course of employment and was fraudulent, at least where the employer is uninsured and the claim is accepted by an upstream insurer pursuant to 39-71-405.

DARRELL MCCLANAHAN V. STATE FUND
WCC No. 9601-7471

[Findings of Fact Conclusions of Law and Judgment \[7/5/96\]](#)

KEY WORDS: *DUTIES OF INSURER, *PENALTY, *ATTORNEY FEES.

Claimant entitled to medical treatment and TT on account back injury. Fact of IA was undisputed. Employer, however, disputed back. Contemporaneous medical documentation supported back injury and insurer offered no other explanation for condition. Penalty and fees imposed for insurer's failure to adequately investigate and use independent judgment.

MICHAEL KAISER v. SEARS ROEBUCK & CO.
WCC No. 9603-7514

[Findings of Fact Conclusions of Law and Judgment \[6/28/96\]](#)

KEY WORDS: *RELATEDNESS, *REASONABLE MEDICAL EXPENSES.

Physician's examination and first month of physical therapy are reasonable medical expenses for myofascial pain related to claimant's injuries from an electric shock. Although claimant has concurrent conditions contributing to his myofascial pain, treatment cannot be unbundled from his various conditions. Medical evidence established that additional PT was not reasonable.

MICHELLE CHAPMAN V. NAT'L UNION FIRE INS. CO. OF PITTSBURGH
WCC NO. 9601-7473

[Order on Appeal \[6/25/96\]](#)

KEY WORDS: *MEDICAL OPINIONS, *MEDICAL TESTIMONY, *REHABILITATION PANEL, *SUBSTANTIAL EVIDENCE, *39-71-1012.

DLI determination finding option (c) -- return to work in a related occupation -- supported by substantial evidence. Hearing examiner properly gave treating physician's last minute disapproval of return to work little weight where the disapproval contradicted physician's prior opinions.

RALPH KRESS V. STATE FUND
WCC No. 9604-7532

[Order Partially Granting Motion to Dismiss \[6/25/96\]](#)

KEY WORDS: *CHANGE OF CONDITION, *RES JUDICATA, *TEMPORARY TOTAL DISABILITY, *39-71-739.

Where claimant raised and the Court adjudicated his entitlement to temporary total disability in a prior case, his TT entitlement may not be relitigated. He may seek TT from the date of trial onward but must show that his condition and disability has changed since the date of the prior trial. Partial Dismissal granted.

JOHN SMART v. STATE FUND
WCC No. 9403-7018

Smart v The Montana Historical Society, 53 St. Rept. 554 **AFFIRMED 6/21/96.**

KEY WORDS: *PERMANENT TOTAL DISABILITY, * OCCUPATIONAL DISEASE, *WORKER'S JOB POOL, *LEGISLATIVE HISTORY

Supreme Court approves of WCC resorting to legislative history in adopting a definition for "worker's job pool" under the occupational disease act. Claimant is not totally disabled even though unable to return to time of injury employment, as he is physically able to do other work.

[Decision and Final Judgment \[10/31/95\]](#)

KEY WORDS: *OCCUPATIONAL DISEASE ACT, *TOTAL DISABILITY, *39-72-102, *39-72-405.

Claimant suffering occupational disease which precludes him from returning to his time-of-injury occupation but who can work at other jobs for which he is qualified and physically able to perform is not entitled to total disability benefits under OD Act.

Smart v. State Compensation Insurance Fund, No. 94-512, 4/20/95. **DISMISSED WITHOUT PREJUDICE - REHEARING DENIED 5/9/95.**

[Order Denying Motion for Summary Judgment \[9/19/94\]](#)

KEY WORDS: *OCCUPATIONAL DISEASE, *JOB POOL, *DISABLED, *DISABILITY, *PERMANENT TOTAL DISABILITY, *39-72-102(4), *STATUTORY INTERPRETATION, *SUMMARY JUDGMENT, *39-71-1011(17), *\$10,000 AWARD.

A worker suffering an occupational disease is not "disabled" within the meaning of the Occupational Disease Act, § 39-72-102(4), where he or she is able to return to a typically available job for which he or she is qualified and which is compatible with the worker's physical condition. "Worker's job pool" defined consistently with section 39-71-1011(7), MCA (1987)(now repealed).

LISA B. LARSEN-ENGLISH V. LUMBERMENS

WCC No. 9512-7465

[Findings of Fact, Conclusions of Law and Judgment \[6/14/96\]](#)

KEY WORDS: *INJURY, *ACCIDENT, *UNUSUAL STRAIN, *UNEXPECTED TRAUMATIC INCIDENT, *AGGRAVATION, *ATTORNEY FEES, *PENALTY, *UNREASONABLE, *HORSEPLAY, *ASSAULT.

Knee injury compensable where slip and fall resulted in further acute injury to and surgery on already bad knee. Slip and fall "unexpected" and result was "unusual" despite insurers arguments to contrary. Horseplay doctrine does not preclude compensation where initiated by another employee and horseplay allowed by employer. Insurer's denial unreasonable.

JOHN BOLDOSSER V. STATE FUND

WCC No. 9601-7481

[Decision on Appeal \[6/10/96\]](#)

KEY WORDS: *OCCUPATIONAL DISEASE, *OCCUPATIONAL DISEASE PANEL, *BURDEN OF PROOF

DLI decision finding that claimant does not have occupational disease reversed where it appears that panel report addresses an injury rather than OD. Remanded for further report and new hearing since other physician's evidence speculative and does not affirmatively establish OD.

NEVA MANWEILER V. TRAVELERS
WCC No. 9511-7445

[Order Granting Claimant's Motion for Summary Judgment and Denying Respondent's Summary Judgment Motion](#) [6/6/96]

KEY WORDS: *OCCUPATIONAL DISEASE, *DEATH BENEFITS, *SETTLEMENT.

OD claim for death benefits not barred by settlement and release executed by deceased claimant. Release extended only to the decedent's claim.

LARRY D. CHANEY v. USF&G
WCC No. 9311-6938

Chaney v. USF&G, 276 Mont. 513, 917 P.2d 912, (1996) **REVERSED - 5/30/96.**

KEY WORDS: *39-71-606, *HAAG, * MAXIMUM MEDICAL IMPROVEMENT,
*INDEMNIFICATION, *ATTORNEY FEES.

Supreme Court applies its previous decision in *Haag*, 906 P.2d 693, finding insurer liable for failure to accept or deny within 30 days. Insurer failed to meet its burden of proof that maximum healing or an intervening effect had occurred. Lastly, determined claimant is entitled to attorney fees.

[Findings of Fact, Conclusions of Law and Judgment](#) [4/6/95]

KEY WORDS: *CARPEL TUNNEL SYNDROME, *RELATEDNESS, *CAUSATION,
*MEDICAL TESTIMONY, *CREDIBILITY.

Claimant failed to persuade the Court that his carpal tunnel syndrome is attributable to a 1983 industrial accident. Claimant not credible and medical opinions supporting his contention were premised squarely on an unreliable history provided by the claimant.

CINDY MINTYALA V. STATE COMPENSATION INSURANCE FUND
WCC 9502-7244

Mintyala v. State Compensation Ins. Fund, 276 Mont. 521, 917 P.2d 442 (1996) **REVERSED/REMANDED 5/30/96.**

KEY WORDS: *UNREASONABLE DELAY, * ATTORNEY FEES, * HANDLOS,

Supreme Court clarifies that in the *Handlos* decision the term “mid-trial” is to be used as a guide not as a prerequisite. Regardless of what version of the statutes are used the penalty statute should be available “where an insurer act unreasonably to deny benefits to which a claimant is legally entitled...”

[Order Dismissing Without Prejudice](#) [6/19/95]

KEY WORDS: *DISMISSAL, *ATTORNEY FEE, MOOT

Following oral argument petition dismissed as issues moot. No attorney fees per *Paulsen v. Entech Inc.*, WCC No. 9209-6591 (decided February 22, 1994)

ROBERT McCLURE V. STATE FUND

WCC No. 9511-7448

[Findings of Fact, Conclusions of Law and Judgment](#) [5/29/96]

KEY WORDS: *CREDIBILITY, *INJURY, *NOTICE, *PAIN BEHAVIOR.

Claimant and his witnesses were not credible and failed to persuade the Court that claimant suffered an industrial injury or timely reported an injury to his employer.

DEBBIE I. GALLUP V. STATE FUND

WCC No. 9604-7537

[Order Dismissing Petition](#) [5/21/96]

KEY WORDS: *MEDIATION, *RES JUDICATA.

Claim for temporary total disability barred by res judicata where claimant in previous case was held not entitled to TTD. Bar ends as of date of previous trial but to be entitled to benefits thereafter claimant will have to prove change in condition. Other claims in petition have not been mediated. Petition dismissed.

RICHARD JOHN OLESKY V. STATE FUND

WCC No. 9511-7446

[Order on Appeal](#) [5/21/96]

KEY WORDS: *APPORTIONMENT, *LAST INJURIOUS EXPOSURE,
*OCCUPATIONAL
DISEASE.

Where occupational disease is attributable to one or both of two successive employments, liability is upon the employer responsible for the last INJURIOUS exposure. Here the first of two employers is responsible since the evidence failed to show that the second employment materially and significantly contributed to the disease. Ten percent

apportionment to non-occupational factors reversed where unsupported.

VICTORIA KLOEPFER v. BECHTEL CONSTRUCTION

WCC No. 9505-7312

Kloepfer v. Lumbermen's Mut. Cas. Co., 276 Mont. 495, 916 P.2d 1310 (1996).
AFFIRMED 5/20/96.

KEY WORDS: *SUBSTANTIAL EVIDENCE

Supreme Court affirms WCC determination that claimant was physically able to perform regular employment and not precluded from returning to full-time work.

[Findings of Fact, Conclusions of Law and Judgment](#) [9/18/95]

KEY WORDS: *PERMANENT TOTAL DISABILITY, *PAIN, *INDEPENDENT MEDICAL EXAMINATION, *MEDICAL OPINIONS, *WADELL'S TESTS

Claimant not permanently totally disabled on account of her pain. Medical testimony established that claimant is able to work. While her pain is real, it is not so severe as to preclude her from work if motivated to do so. While treating physician (an orthopedic surgeon) testified that she can only work part-time, I am more persuaded by panel physicians analysis that she can work full time.

BRAND E. CAEKAERT V. STATE FUND

WCC No. 9306-6809

[Order Granting Attorney Fees](#) [5/16/96]

KEY WORDS: *ATTORNEY FEES.

Where attorney fees awarded, claimant's attorney is entitled to fees for time spent litigating entitlement to fees, although not for time spent establishing the amount of fees. \$75 hourly limit established by the DLI does not apply to injuries suffered prior to November 11, 1988, the date the regulation was adopted.

[Order Denying Respondent's Motion for Reconsideration](#) [12/21/95]

KEY WORDS: *ATTORNEY FEES, *RECONSIDERATION

Motion for reconsideration of order granting attorney fees denied. Matters raised by respondent in support of motion were fully considered in the first place.

[Order Awarding Attorney Fees and Costs](#) [10/12/95]

KEY WORDS: *ATTORNEY FEES, *CARPAL TUNNEL SYNDROME, *JUDICIAL ESTOPPEL, *MEDICAL EVIDENCE, *CAUSATION, *REASONABLENESS SEE UNREASONABLE

WCC decision reversed and remanded by the Supreme Court [268 Mont. 105] for a determination of attorney fees, costs and penalty. The conduct of the insurer was found to be unreasonable based on unrefuted medical opinion that carpal tunnel was caused by the industrial accident. Insurer ignored only medical opinion in file. cites to *Beckers v. State Fund* WCC No. 9407-7098. Claimant did not pursue the penalty

Caekaert v. State Compensation Ins. Fund, 268 Mont. 105, 885 P.2d 495 (1994).
REVERSED AND REMANDED- 11/22/94

KEY WORDS: *ATTORNEY FEES, *CARPAL TUNNEL SYNDROME, *JUDICIAL
ESTOPPEL, *MEDICAL EVIDENCE, *CAUSATION, *REASONABLENESS ,
*LAST
INJURIOUS EXPOSURE

State Fund failed to offer sufficient evidence to establish that the claimant had experienced a second event or exposure which would have resulted in subsequent surgeries. Medical evidence established that claimant's condition was a result of the occupational disease suffered in 1988. Claimant's testimony in separate case regarding his disability due to back problems does not constitute judicial estoppel in this case and he has entitlement to temporary total benefits. Issue of unreasonableness is remanded to WCC.

RICHARD WARE V. STATE FUND
WCC No. 9508-7361

APPEALED 6/12/96 - DISMISSED 9/11/97.

[Findings of Fact, Conclusions of Law and Judgment](#) [5/15/96]

KEY WORDS: *CONTRACT FOR HIRE, *TEMPORARY TOTAL DISABILITY, *WAGES,
*WEAVER, *39-71-116(23), MCA (1991), *39-71-123(1), MCA (1991).

Claimant not entitled to temporary total disability benefits where he continues to work, albeit less than full time and not every week, as a carpenter. By his work he has demonstrated a residual normal labor market of jobs he can perform and therefore has not proven a complete inability to work. When surgery was indicated, however, and he had stopped working, he is entitled to TTD benefits.

DENNIS O. BEST, SR. v. STOCKMAN'S BAR & CAFE
WCC No. 9407-7095

Best v. State Fund, 276 Mont. 302, 916 P.2d 108 (1996). **AFFIRMED 5/3/96.**

KEY WORDS: *SUBSTANTIAL EVIDENCE, *MEDICAL TESTIMONY

Relying on testimony of claimant's chiropractor the Supreme Court finds WCC had sufficient evidence to establish that claimant's preexisting injury was the cause of his total

disability and not the exacerbation which may have occurred while working for the cafe.

[Findings of Fact, Conclusions of Law and Judgment](#) [8/23/95]

KEY WORDS: *PERMANENT TOTAL DISABILITY, *AGGRAVATION, *39-71-116(6),
*CAUSATION, *DISABILITY.

Claimant not entitled to compensation benefits where hired as part of a husband-wife team to run restaurant bar and wife did 95% of work because claimant's pre-existing back injury precluded him from a greater role. Prior to injury, claimant was unable to work independently and re-aggravation of back condition did not worsen his disability.

BEAULIEU RON v. UEF/HUMAN DYNAMICS

WCC No. 9512-7463

[Summary Judgment](#) [5/21/96]

KEY WORDS: *MOOT,

Respondent is entitled to Summary Judgment as all issues raised by the claimant have been resolved.

[Order Denying Motion for Summary Judgment](#) [4/25/96]

KEY WORDS: *SUMMARY JUDGMENT, *DISPUTE, *MEDIATION, *COUNTER-CLAIM,
*DEFENSE.

Motion to dismiss denied even though insurer has agreed to pay medical bills itemized in petition. Insurer intends to offset prior overpayments against the medical bills and claimant disputes amount of offset. Offset not raised as defense or counter-claim. Thus, so long as insurer refuses full payment of the medical bills listed by claimant a dispute remains.

CARL LARSON v. CIGNA INSURANCE CO.

WCC No. 9307-6828

Larson v. Cigna Ins. Co., 276 Mont. 283, 915 P.2d 863 (1996) **REVERSED/REMANDED**
4/23/96

KEY WORDS: *SUBSTANTIAL EVIDENCE, *COLES

Supreme Court holds that WC lacked substantial evidence to conclude that claimant had a reasonable prospect of finding employment in the normal labor market. Age, multiple health problems and a lifetime of experience in heavy labor were factors considered. WCC did not err in not requiring insurer to comply with the *Coles* criteria.

[Order and Judgment Awarding Costs on Appeal](#) [9/19/95]

KEY WORDS: *25-10-104, MCA, *COSTS ON APPEAL.

Claimant was the successful party on first appeal and is entitled to costs. Petitioner to recover \$522.96 in costs from the respondent.

[Findings of Fact, Conclusions of Law and Judgment \[9/19/95\]](#)

KEY WORDS: *ODD LOT EMPLOYEES, *PERMANENT TOTAL DISABILITY,
*39-71-116(13) (1979), *METZGER.

Decision after remand directing the WCC to determine if claimant's inguinal hernia was in itself permanently totally disabling. Having considered the medical and vocational testimony, we find that it is not. Permanent total disability benefits denied.

Larson v. Cigna Ins. Co., 271 Mont. 98, 894 P.2d 327 (1995).
REVERSED/REMANDED 5/4/95.

KEY WORDS: *FIRST IMPRESSION, *LIBERAL CONSTRUCTION, *PREEXISTING
CONDITION

Supreme Court adopts legal principles from Washington and Alaska in finding that regardless of a preexisting heart condition which would eventually totally disable the claimant, the WCC must determine whether a hernia which was work related and developed subsequent to heart condition would have caused permanent total disability.

[Findings of Fact, Conclusions of Law and Judgment \[10/19/94\]](#)

KEY WORDS: *PERMANENT TOTAL DISABILITY, *PREEXISTING CONDITION,
*TEMPORARY TOTAL.

Claimant not entitled to further temporary total disability benefits or to permanent total benefits for hernia condition where claimant shortly after the hernia became permanently totally disabled on account of the natural progression of a preexisting heart condition and the hernia did not at that time contribute to him removing himself from the labor market.

[Order Denying Motion to Compel \[2/22/94\]](#)

KEYWORDS: *MOTION TO COMPEL, *RULE 26(E), *DISCOVERY.

Motion to compel denied as no basis for order under Rule 26(e). Had been advised that everything had been produced and could continue with discovery to test validity of completeness.

DON FILCHER V. NATIONAL UNION FIRE INS

WCC No. 9507-7347

[Decision and Order \[4/15/96\]](#)

KEY WORDS: *SOCIAL SECURITY OFFSET, *ESTOPPEL, *DUTY TO INVESTIGATE

Insurer had duty to investigate nature of social security benefits where, although it received a copy of a notice stating the benefits were retirement benefits, claimant informed insurer that they were disability benefits and was under age 62, and other correspondence indicated he was being considered for disability. Insurer estopped from taking offset 4 years later when it did investigate.

THOMAS R. BROEKER v. GREAT FALLS COCA-COLA BOTTLING CO.

WCC No. 9211-6631

IRVIN ELL v. MONTANA DEPARTMENT OF HIGHWAYS

WCC No. 9211-6631

Broeker v. Great Falls Coca-Cola, 275 Mont.502, 914 P.2d 967, (1996). AFFIRME D 4/5/96.

KEY WORDS: *SOCIAL SECURITY OFFSET, *MCCLANATHAN, *COLA

SS offset should be based on SSDI benefits as indexed to the date on which claimant became eligible to receive those benefits.

[Order Revising Decision and Judgment \[3/24/95\]](#)

Scrivener's errors and corrected. JUDGMENT at paragraphs 2, 3, 4, and 5 are corrected.

[Corrected Decision and Judgment \[3/6/95\]](#)

KEY WORDS: *SOCIAL SECURITY OFFSET; *MCCLANATHAN,

In computing social security offset the insurer must ignore cost-of-living increases included in the social security benefit, including any cost-of-living increases contained in the initial benefit. Claimant not entitled to have offset based on social security benefit he theoretically would have received had his disability onset occurred at earlier time. Receipt of social security due to workers' compensation injury so offset properly taken.

KATHERINE J. NELSON V. STATE FUND

WCC No. 9602-7505

[Order Denying Motion to Dismiss & Directing Parties to Request Mediator's Recommendation \[4/4/96\]](#)

KEY WORDS: *MEDIATION.

Party cannot unilaterally postpone mediator's decision even where additional

documentation needed. Facts furnished to Court indicate that documents furnished in time for mediator to make recommendation in time for petitioner to meet Court's filing deadline. Parties ordered to request mediator's report and consider it but motion to dismiss for failure to mediate is denied.

MARIAN MAAS v. LUMBERMENS MUTUAL CASUALTY
WCC No. 9505-7307

[Findings of Fact, Conclusions of Law and Judgment](#) [3/22/96]

KEY WORDS: *ACCIDENT, *CREDIBILITY.

Disputed accident case. Claimant found credible and accident found to have occurred as claimed. Denial, however, reasonable, so no attorney fees or penalty.

[Order Regarding confidentiality of Psychological Records](#) [10/06/95]

KEY WORDS: *DISCOVERY, *MEDICAL RECORDS, *CONFIDENTIALITY.

Order entered requiring confidentiality of petitioner's psychological records. The records may not be released without Court permission.

SUZANNE SOUTH v. COMBUSTION ENGINEERING, INC.
WCC No. 9403-7019

South v. Transportation Insurance Company, 275 Mont. 397, 913 P.2d 233 **REVERSED 3/18/96; REHEARING DENIED 4/11/96.**

KEY WORDS: *CONTRACTS, *FULL AND FINAL COMPROMISE SETTLEMENT,
*MUTUAL MISTAKE OF FACT,

If a party can show a mutual mistake of *any* material fact which would impact the contract to such an extent that the intended bargain of the parties is defeated, the contract may be rescinded. *Mitchell v. Boyer* at 774 P.2d 386. In this instance the parties mistakenly believed claimant could be a successful massage therapist following training. SC discounts fact that six other jobs were identified as being within claimant's abilities for reason that approval was before reinjury while training to be a massage therapist.

[Findings of Fact, Conclusions of Law and Judgment](#) [8/25/95]

KEY WORDS: *REOPEN, *SETTLEMENT, *MUTUAL MISTAKE OF FACT.

Claimant not entitled to reopen FULL AND FINAL COMPROMISE SETTLEMENT where evidence fails to disclose mutual mistake concerning her medical condition or her ability to work. Back condition which developed after settlement is not reason for reopening where it was the result of some new occurrence.

EDWIN TAYLOR v. MT. DEPT. OF HIGHWAYS

WCC No. 9406-7066

Taylor v. State Compensation Ins. Fund, 275 Mont. 432, 913 P.2d 1242, 53 St.Rep. 201 (1996). **AFFIRMED 3/18/96; REHEARING DENIED 4/22/96.**

KEY WORDS: *FRAUD, *CREDIBILITY, *SUBSTANTIAL EVIDENCE

Supreme Court affirms WCC's findings that three of claimant's claims were fraudulent. Emphasis given to trial court's judgment re: credibility when substantial evidence supports the trial court's determination.

Order Supplementing Findings of Fact and Denying Post-trial Motions [10/6/95]

KEY WORDS: *FRAUD, *CREDIBILITY, *ATTORNEYS

Claimant's motion to amend or withdraw findings or for new trial denied except for limited amendment addressing accusations made against claimant's counsel and further address claimant's contention. Court finds no improper conduct by counsel and reaffirms its determination that 2 of 3 claims were fraudulent.

Findings of Fact, Conclusions of Law and Judgment [8/21/95]

KEY WORDS: *FRAUD, *CREDIBILITY.

Two of three of the claimant's workers' compensation claims were fraudulent. Repayment of \$55,362.85 ordered.

Order Disqualifying Petitioner's Counsel [11/30/94]

KEY WORDS: *ATTORNEY, *ATTORNEY DISQUALIFICATION.

Petitioner's attorney who will appear as a witness at trial disqualified where the subject matter of his testimony involves a disputed key issue in the case.

Order Denying Motion for Summary Ruling [10/21/94]

KEY WORDS: *CREDIBILITY, *SUMMARY JUDGMENT.

Summary judgment denied to claimant in case where insurer raised affirmative defense of fraud and evidence raises triable issues of fact.

Order Granting Motion to Compel Answers to Deposition Questions [8/17/94]

KEY WORDS: *MOTION TO COMPEL, *DISCOVERY, *RULE 26(B)(1) MONT. R. CIV.P.

A case which involves a fraud charge. Claimant is ordered to answer deposition questions "which may reasonably lead to the discovery of admissible evidence."

RUSSELL L. STONE V. STATE COMPENSATION INSURANCE FUND

WCC No. 9601-7486

[Order Regarding Petitioner's Intent to Appeal; Order Requiring Response to Request for Postponement](#) [3/15/96]

KEY WORDS: *PRO SE, *

Attempt to advise a pro se claimant of proper procedures.

GLACIER PARK V. BRUCE PARKER

WCC No. 9508-7353

DISMISSED WITH PREJUDICE 10/22/96

[Order and Judgment](#) [3/15/96]

KEY WORDS: *SUBROGATION.

Based on this Court's recent holding in Ness (12/29/95), there is subrogation where economic damages exceed third party settlement even though the settlement was for less than policy limits.

CLINTON LOSS V. LUMBERMENS MUTUAL

WCC No. 9512-7457

[Final Judgment](#)

[Findings of Fact, Conclusions of Law and Judgment](#) [3/15/96]

KEY WORDS: *39-72-405, *COLES, *CREDIBILITY, *OCCUPATIONAL DISEASE, *MEDICAL TESTIMONY, *PERMANENT PARTIAL DISABILITY, *TEMPORARY TOTAL DISABILITY.

Claimant not entitled to temporary total disability benefits after reaching MMI. *Coles* compliance at time of termination of benefits sufficient even though doctor approving return to work at time-of-injury job may ultimately prove wrong. *Coles* procedural; it does not add substantive requirements to TTD statute. Claimant, however, entitled to \$10,000 under 39-72-405, MCA. Other issues.

DUANE ERICKSON v. CHAMPION INTERNATIONAL

WCC No. 9506-7336

[Order on Appeal](#) [3/12/96]

KEY WORDS: *AGGRAVATION, *APPEAL, *OCCUPATIONAL DISEASE, *REMAND.

Finding of no occupational disease, reversed where legal standard applied by medical panel physician was incorrect. Remanded for new hearing to determine whether claimant's job accelerated or worsened his underlying degenerative knee conditions. Predisposition does not preclude OD finding where job aggravates condition. Notice issue not raised below is rejected.

[Order Denying Motion to Present Additional Evidence](#) [7/26/95]

KEY WORDS: *2-4-703, *24.5.350(4), *PRO SÉ

Additional evidence is material but claimant chose to proceed pro sé in the hearing below, therefore, claimant failed to persuade court that there were good reasons for his failure to present medical evidence at the department hearing.

MICHAEL ROSS V. STATE FUND
WCC No. 9506-7319

[Order on Appeal](#) [2/28/96]

KEY WORDS: *JUDICIAL REVIEW, *OPTION (C), *REHABILITATION.

Judicial review of option (c) determination of Department under old rehabilitation panel law. Where decision bases solely on depositions and exhibits, decision subject to higher scrutiny. Decision in this case clearly erroneous. Evidence does not support availability of job identified by hearing officer. Treating physician's testimony not given sufficient weight. Remanded to DLI.

KEVIN S. FOX v. LIBERTY MUTUAL FIRE INS. CO.
WCC No. 9601-7468

[Order Denying Motion in Limine](#) [2/27/96]

KEY WORDS: *EXPERT TESTIMONY, *LINDEN V. HUESTIS.

Motion in limine to exclude physician's testimony because he did not personally examine claimant is denied as frivolous. *Linden v. Huestis*, 247 Mont. 383, cited by claimant provides no support for argument that a physician or any other expert must personally examine a claimant. Claimant's suggestion that physician not timely identified frivolous since he plainly was.

[Order Denying Motion for Partial Summary Judgment](#) [2/1/96]

KEY WORDS: *ACCEPTANCE, *CLAIM, *HAAG V. STATE FUND, *NOTICE, *39-71-606.

Section 39-71-606, requiring an insurer to accept or reject a "claim" within 30 days, as well as the Supreme Court's decision in *Haag*, apply only to the INITIAL CLAIM FOR

COMPENSATION and do not apply to subsequent demands for specific benefits. Claimant's motion for partial summary judgment denied.

KENNETH MARTIN v. STATE FUND
WCC No. 9501-7210

Martin v. State Fund, 275 Mont.190, 911 P.2d 848, 53 St.Rep. 128 (1996).
REVERSED/REMANDED, 2/22/96.

KEY WORDS: *SETTLEMENTS, *REOPEN, *STATUTE OF LIMITATIONS, *SUMMARY JUDGMENT, *92-826, *JURISDICTION, *92-848.

Supreme Court finds that WCC erred in its conclusion that it lacked jurisdiction to reopen or set aside a "final settlement." This action is viewed as procedural rather than substantive, therefore the law in effect at the time the case proceeds to trial is controlling. Supreme Court refuses to set aside the settlement on appeal. A factual record must be made.

[Summary Judgment \[5/11/95\]](#)

KEY WORDS: *SETTLEMENTS, *REOPEN, *STATUTE OF LIMITATIONS, *SUMMARY JUDGMENT, *92-826, RCM, *92-848 RCM, *39-71-2909, *WOLFE V. WEBB

Summary judgment granted insurer where claimant seeks to reopen final settlement executed in 1980. At the time of injury and agreement, there was a four-year limitation on Court's jurisdiction to reopen final settlements. Elimination of the limitation in 1987 was expressly applicable only to injuries arising thereafter.

BRUCE MARCOTT v. LOUISIANA PACIFIC CORP.
WCC No. 9408-7104

Marcott v. Louisiana Pac. Corp., 275 Mont. 197, 911 P.2d 1129, 53 St.Rep. 106 (1996)
AFFIRMED 2/14/96

KEY WORDS: *ATTORNEY FEES, *REASONABLENESS, *PENALTY, *HOLTEN

Supreme Court concludes that compensability of claimant's injury was not "so clearly decided as to negate any genuine doubt from a legal standpoint." It further reaffirms previous cases imposing an affirmative duty on insurers to reasonably investigate and evaluate a claim, but that duty does not include discounting the claimant's own statements to the employer and his doctors, thus building a case for the claimant. The *Holten* decision does not require immediate payment of benefits where legitimate factual or legal issues relating to compensability and liability exist.

[Findings of Fact, Conclusions of Law and Judgment \[12/7/94\]](#)

KEY WORDS: *ACCIDENT, *ATTORNEY FEES, *GASTROCNEMIUS MUSCLE,

*INJURY, *39-71-119.

Rupture of gastrocnemius muscle in the lower calf of the leg while walking rapidly and turning sharply constitute a compensable industrial injury where medical testimony established that the event caused an unusual amount of force on the muscle, thereby causing it to rupture. Denial of the claim not unreasonable where factual controversy concerning exact circumstances of injury and a medical consultant advised insurer that the rupture was not work related.

[Order Regarding Various Motions \[10/21/94\]](#)

KEY WORDS: *ATTORNEYS, *DISCOVERY, *EXPERT WITNESSES.

Various discovery motions denied. Expert witness answer adequate. Answer to question concerning factual basis of defense adequate where numerous depositions taken and witness's summaries and statements provided. Counsel cautioned against motions "brought merely on principle and in absence of potential prejudice to the moving party."

JAN GATES v. LIBERTY NORTHWEST INS. CORP.

WCC No. 9508-7362

[Order Clarifying Decision \[2/13/96\]](#)

KEY WORDS: *AMENDED FINDINGS, *REHABILITATION BENEFITS.

Order clarifying original decision issued on 12/29/95. (1) Rehab benefits available only if worker unable to return to time-of-injury job on account of injury. (2) All statutory criteria for rehab benefits must be satisfied. (3) Rehab benefits payable only upon filing of a plan. (4) If parties cannot agree on plan, then they may petition Court.

[Findings of Fact, Conclusions of Law and Judgment \[12/29/95\]](#)

KEY WORDS: *PERMANENT PARTIAL DISABILITY, *WAGE LOSS, *REHABILITATION,
*GJERDE, *39-71-703

Claimant entitled to 20% PPD award where doing heavy labor at time of injury and now only qualifies for light. Percentage for wage loss premature where not working or seeking employment and rehabilitation procedures not followed. Percentage requires use of ACTUAL wages — earning capacity analysis improper. *Gjerde* overruled in part.

[Order Denying Motion for Partial Summary Judgment \[11/7/95\]](#)

KEY WORDS: *PERMANENT PARTIAL DISABILITY, *WAGE, *WAGE LOSS.

Motion for partial summary judgment requesting Court to hold as a matter of law that

where the claimant has not returned to work, the average wage of medically approved jobs for claimant injured in August 1993 must be used in computing wage loss under 39-71-703(c). Post-injury wage must be determined based on facts of the case.

JOAN REEVES v. LIBERTY MUTUAL/UPS

WCC No. 9502-7242

Reeves v. Mutual Fire Ins., 275 Mont. 152, 911 P.2d 839, 53 St.Rep. 88 (1996).
AFFIRMED 2/12/96.

KEY WORDS: *REHABILITATION BENEFITS, *39-71-2001(1993), *39-71-105(1993)

Supreme Court states statutes encourage rehabilitation, but does not obligate an insurer to pay for every plan which may be conceived by a qualified injured worker. Affirms WCC's finding that claimant's plan was not reasonable.

[Judgment \[6/09/95\]](#)

KEY WORDS: *REHABILITATION BENEFITS, *39-71-2001.

Injured UPS worker not entitled to rehabilitation benefits to allow her to complete masters degree in family counseling where she has not worked in her undergraduate field and her expectations concerning career and earnings are unrealistic.

STEVEN K. YAGER v. MSGIA

WCC No. 9512-7452

[Order Denying Motion to Impose Sanctions \[2/12/96\]](#)

KEY WORDS: *SANCTIONS, *SETTLEMENT CONFERENCE.

Motion for sanctions for failure of insurance company representative to attend settlement conference denied where insurer's attorney had full settlement authority. New procedures for identifying settlement conference representatives adopted.

DEBBIE I. GALLUP v. STATE FUND

WCC No. 9503-7257

[Findings of Fact, Conclusions of Law and Judgment \[2/9/96\]](#)

KEY WORDS: *CAUSATION, *CONWAY, *HIDRADENITIS, *MAXIMUM MEDICAL HEALING, *MOFFETT, *TEMPORARY TOTAL DISABILITY.

Insurer accepted liability for hidradenitis resulting from a blister claimant developed at work but denied liability for later outbreaks, arguing that they were unrelated. Testifying physicians were unable to identify cause of hidradenitis. In light of their uncertainty and the fact that the initial outbreak followed a blister, later outbreaks were held compensable

under *Conway* line of cases. But TTD denied since MMI reached.

LIBERTY MUTUAL v. ROSEMARIE BLANCHER

WCC No. 9511-7443

[Order Dismissing Appeal for Lack of Jurisdiction](#) [2/9/96]

KEY WORDS: *EXHAUSTION OF ADMINISTRATIVE REMEDIES, *JURISDICTION.

Appeal of DLI order reinstating temporary total disability benefits for up to 49 days, pursuant to §39-71-610, MCA, dismissed for failure to exhaust administrative remedies. The Order in this case was signed by an ERD supervisor. Either party was entitled to request a hearing before the Department, after which the matter can be appealed. No hearing was requested or held.

DANE C. SCHOFIELD

WCC No. 9510-7415

[Order on Judicial Review](#) [2/07/96]

KEY WORDS: *ATTORNEY FEES.

Attorney fee agreement limiting attorney's fee to amounts secured **due to the attorney's efforts** means what it says. The attorney here failed to show that he did anything to secure the PPD benefits paid to claimant and he is not entitled to a fee. PPD benefits computed and paid by insurer without indication of any underlying dispute or any apparent input from attorney.

STEVE WILLIAMS v. STATE FUND

WCC No. 9505-7304

[Decision and Judgment](#) [2/1/96]

KEY WORDS: *SICK LEAVE, *TEMPORARY TOTAL DISABILITY, *WAGES,
*39-71-116(20) (1985).

Under 1985 law, wages do not include paid sick leave which is donated to the injured worker by co-employees. Such paid sick leave do not affect claimant's entitlement to temporary total disability benefits.

JACQUI WALLS v. TRAVELERS

WCC No. 9509-7385

AFFIRMED 1/23/97.

[Findings of Fact, Conclusions of Law and Judgment](#) [1/17/96]

KEY WORDS: *ACCIDENT, *CREDIBILITY.

Claim for compensation denied where Court did not believe claimant's testimony that she was hurt at work. Alleged accident witnessed by customer of store who testified and denied claimant's allegations. Other aspects of claimant's story were either uncorroborated or contradicted by credible witnesses.

DONALD BONAN v. IKE & SUSAN'S LOUNGE

WCC No. 9507-7349

[Findings of Fact, Conclusions of Law and Judgment](#) [1/12/96]

KEY WORDS: *CREDIBILITY.

Claimant alleged that he contracted a severe, necrotizing bacterial infection through a cut he suffered at work. The cut was adjacent to his thumb. He reported to doctors that he developed the cut from pulling a hangnail. The Court did not find his claim that the cut was job related to be credible and denied the claim.

JOSEPH DAVIS v. ASARCO, INC.

WCC No. 9512-7464

[Order Denying Motion to Dismiss](#) [1/08/96]

KEY WORDS: *MEDIATION, *JURISDICTION.

Motion to dismiss for failure to complete mediation by time of filing of petition is denied where mediation process complete prior to filing deadline for next term of Court. Trial setting reaffirmed but petitioner's counsel warned that jumping the gun again will result in dismissal.

MARY C. STORMONT v. HILLHAVEN CORP.

WCC No. 9511-7432

[Order Permitting Independent Medical Examination](#) [1/05/96]

KEY WORDS: *INDEPENDENT MEDICAL EXAMINATION.

Under section 39-71-605(1), MCA, an insurer may require claimant to submit to an IME by a physician designated by it. Section 39-71-605(2), which provides for the DLI to designate the examiner, provides an alternate but not exclusive method for IME exams. Therefore, claimant must submit to IME scheduled by insurer.

[Order Denying Motions for Summary Judgment and Joinder](#) [1/3/96]

KEY WORDS: *SUMMARY JUDGMENT

Motion for summary judgment denied where supporting documents unauthenticated and it appears that there are factual disputes and critical issues raised by petition are not even addressed. No further proceedings on summary judgment permitted since trial will be just as economical.

MICHAEL BAILEY v. HEAD & BAILEY CONST. CO.

WCC No. 9404-7033

[Findings of Fact, Conclusions of Law and Judgment](#) [1/5/96]

KEY WORDS: *ACCIDENT, INJURY, *AGGRAVATION, *MEDICAL OPINIONS,
*CREDIBILITY, *39-71-119(5), *DISEASE (DEFINED).

Claimant failed to persuade the Court that his dermatitis was work-related. Treating physician's opinion that it was work-related was based on history provided by claimant and that history was not credible. Moreover, three other physicians disagreed even if history was true and their opinions were more persuasive.

DON HAMLIN v. HERITAGE INN

WCC No. 9507-7348

[Findings of Fact, Conclusions of Law and Judgment](#) [12/29/95]

KEY WORDS: *SUBSEQUENT INJURY, *CREDIBILITY, *MEDICAL OPINIONS.

Claimant failed to persuade court that the second non-work-related injury to his left knee was caused or related to his first work-related injury. Injuries were different and mechanisms of the injuries were different. Written opinion of treating physician rejected where he did not testify, his opinion was unsupported, and IME physician credible. Claim that instability of knee caused second injury was not credible.

RALPH KRESS v. JIM AND LOUIE BOUMA

WCC No. 9505-7292

[Findings of Fact, Conclusions of Law and Judgment](#) [12/27/95]

KEY WORDS: *REOPEN, *SETTLEMENTS, *CONTRACT LAW.

Settlement reopened where parties mutually mistaken about low-back condition. Also, settlement agreement which leaves medicals open leaves open all medicals which claimant can show are related to his injury even though claims examiner has previously stated that insurer will not pay for the condition.

MIKE RUSSELL v. NORTH PARK TRANSPORT

WCC No. 9511-7442

[Order Denying Motion to Dismiss; Order Vacating Scheduling Order](#) [12/27/95]

KEY WORDS: *MEDIATION

Where mediator requests additional information and neither party objects to the request, mediation deadlines are postponed until the additional information is submitted. If party thereafter disagrees with submission of additional information, s/he shall notify mediator so recommendation can issue based on available information.

CAROL GIEST v. LUMBERMENS MUTUAL CASUALTY CO.
WCC No. 9511-7444

[Errata to Order Affirming Prior Order Denying Motion to Dismiss](#) [12/22/95]

KEY WORDS: *MEDIATION, *RULES.

Order issued indicating that subsection (3), ARM 24.28.108, which required both parties to agree that they cannot resolve a dispute in order to invoke the Court's jurisdiction prior to the expiration of 45 days following mediator's recommendation, has been repealed effective January 1, 1996. On December 14, 1995, court declared subsection (3) invalid.

[Order Reaffirming Prior Order Denying Motion to Dismiss](#) [12/14/95]

KEY WORDS: *MEDIATION, *RULEMAKING.

DLI rule requiring parties to wait 45 days after mediation before they can petition Court unless both parties agree that they cannot resolve their dispute conflicts with statute which permits petition upon one of the parties rejecting the mediator's recommendation. Rule is invalid and of no effect.

[Order Denying Motion to Dismiss](#) [12/08/95]

KEY WORDS: *MEDIATION, *JURISDICTION, *39-71-2411.

Mediation complete and Workers' Compensation Court jurisdiction triggered immediately upon either party mailing the mediator notice of rejection of the mediator's recommendation.

NICKY SHORTEN v. STATE FUND
WCC No. 9508-7366

[Order on Appeal](#) [12/22/95]

KEY WORDS: *CARPAL TUNNEL SYNDROME, *OCCUPATIONAL DISEASE,
*OCCUPATIONAL DISEASE PANEL.

Department decision denying claim for occupational disease benefits affirmed on appeal

as supported by substantial evidence. While it is probable that claimant suffered from carpal tunnel syndrome, three OD panel doctors concluded she did not suffer from an occupational disease and she failed to present affirmative medical opinion to the contrary.

JERRY RICH v. STATE FUND

WCC No. 9508-7382

[Order Dismissing Petition](#) [12/20/95]

KEY WORDS: *REHABILITATION PANEL, *JURISDICTION.

Rehabilitation panel procedures applicable to 1987-1991. Claimant cannot circumvent those procedures by petitioning Court. Petition dismissed. Claimant must exhaust panel provisions.

BRIAN OSTWALD v. PLUM CREEK MANUFACTURING

WCC No. 9508-7376

DISMISSED 5/14/96.

[Findings of Fact, Conclusions of Law and Judgment](#) [12/19/95]

KEY WORDS: *INJURY, *ACCIDENT, *39-71-119, *39-71-407, *OCCUPATIONAL DISEASE, *BELTON, *ATTORNEY FEE

Claimant, who experienced popping in his back and the immediate onset of extreme pain and numbness when lifting a heavy door, suffered an compensable workers' compensation injury even though he undoubtedly has an underlying occupational disease involving his back. Insurer's attempt to apply *Belton* to preclude claim without merit as *Belton* involves prior accepted claim and there was none here. Attorney fees awarded.

[Order Denying Motion for Summary Judgment](#) [12/05/95]

KEY WORDS: *OCCUPATIONAL DISEASE, *RES JUDICATA, *COLLATERAL ESTOPPEL, *JURISDICTION,

Where insurer invoked occupational disease process in response to a workers' compensation claim and DLI determined worker has an occupational disease, the worker may still pursue workers' compensation claim over specific accident. Res Judicata and collateral estoppel doctrines inapplicable since issues not the same; OD determination is not incompatible with WC claim.

GEORGE BOHARSKI v. AETNA CASUALTY & SURETY CO.

WCC No. 9509-7386

[Findings of Fact, Conclusions of Law and Judgment](#) [12/15/95]

KEY WORDS: *LUMP SUM.

Petition requesting partial lump sum for garage, furniture and appliances denied where items were extravagant. Claimant showed no specific need for the items, and the Court was unpersuaded he intends to use the lump sum for the purposes stated.

ALEXIS RAUSCH v. STATE FUND/LARSON LOGGING

WCC No. 9509-7398

[Order Limiting Discovery](#) [12/15/95]

KEY WORDS: *DISCOVERY, *DOMICILIARY CARE.

This case involves proper rate for domiciliary care being provided by wife. Claimant's request for information regarding all domiciliary care cases involving insurer is denied. Limited information for area in which claimant lives is allowed.

HELEN JO KIMERY v. STATE FUND

WCC No. 9507-7338

[Summary Judgment](#) [12/11/95]

KEY WORDS: *DEATH BENEFITS, *JURISDICTION, *ANNULMENT, *REMARRIAGE.

Where the insurer was not a party to the annulment proceeding, the annulment of subsequent marriage does not automatically reinstate insurer's obligation to pay benefits to the widow of a deceased worker. Since issue of valid remarriage is tied to issue of benefits, WCC has jurisdiction to determine if annulment should be retroactively applied so as to resurrect benefits.

LUNDBERG v. LIBERTY NORTHWEST

WCC No. 9312-6965

Lundberg v. Liberty Northwest Insurance, 268 Mont. 499, 887 P.2d 156 (1994).
REVERSED 12/6/95; REHEARING DENIED

KEY WORDS: *INDEPENDENT CONTRACTOR, *39-71-120.

Liability had been denied on basis that claimant was an independent contractor in the logging business. Supreme Court found second part of control test established in *Sharp*, 178 Mont. at 425, "engaged in an independent trade" was sufficient to make a determination that claimant **was an employee**, reversing the WCC.

[Findings of Fact, Conclusions of Law and Judgment](#) [5/25/94]

JACK MURER, et al. v. STATE FUND

WCC No. 9206-6487

_____ Mont. _____, _____ P.2d _____, _____ St.Rep. _____ (1997). AFFIRMED IN PART, REVERSED IN PART, REMANDED. 6/23/97

KEY WORDS: *MURER, *SETTLEMENTS, *LAW OF THE CASE, *ATTORNEY FEES, *COLA, *PENALTY, *REASONABLENESS.

Supreme Court reversed finding that 1987 cap expired July 1, 1991, rather it expired on July 1, 1989. Affirmed holding that settlement agreements executed during pendency of litigation barred further claim to Murer benefits, concluding that any ambiguities must be strictly construed against the party who created them, in this case claimant's attorneys. Affirmed conclusion that a claimant's was entitled to an increase in his lump sum award per *Murer II*, and additionally per holding that 1987 cap expired in 1989 granted increase for years of '89 through '91 which had been denied by the WCC. Affirmed penalty award. Reversed WCC and granted attorney fees based on the common fund doctrine.

[Stay of Judgment \[12/04/95\]](#)

KEY WORDS: *STAY OF JUDGMENT

Stay of execution of benefit payments by the State Fund pending completion of the appeal process.

[Final Decision and Judgment \[11/20/95\]](#)

KEY WORDS: *MURER, *SETTLEMENTS, *LAW OF THE CASE, *ATTORNEY FEES, *COLA, *PENALTY, *REASONABLENESS.

Complex decision holding that settlement agreements executed during pendency of litigation barred further claim to Murer benefits and that Supreme Court's decision in *Murer II* precludes consideration of claimant's argument that the 1987 cap expired July 1, 1989. COLA awarded one claimant. Increase in impairment award made in another. Some attorney fees and penalty awarded.

[Order Staying Attorney Fee Ruling, Authorizing Continued Withholding of Lien Amounts \[9/25/95\]](#)

KEY WORDS: *STAY OF JUDGMENT, *ATTORNEY LIEN.

Order dissolving attorney fee lien stayed in light of petitioners' expressed intention to appeal the Court's ruling. Compelling the State Fund to immediately pay the 20% disputed fee could subject it to double payment of the 20% if petitioners' prevail on appeal. Therefore, State Fund is authorized to continue to withhold the disputed amount.

[Order Denying Fees Under Common Fund Doctrine \[8/07/95\]](#)

KEY WORDS: *ATTORNEY FEES, *COMMON FUND DOCTRINE, *SUBSTANTIAL BENEFIT DOCTRINE, *JURISDICTION.

Request for attorney fees from amounts which may be owed non-party claimants as a result of petitioners' success in *Murer II* denied. Common fund and substantial benefit doctrines held inapplicable.

[Order Scheduling Case for Trial](#) [6/1/95]

KEY WORDS: *MURER, *REMAND

Order setting case for trial to resolve remaining issues after remand by Supreme Court. Discussion between counsel regarding identification and consolidation of further litigation breaks down. Only issues to be resolved are those presented in connection with petitioners in this case.

[Order Denying Renewed Motion for Class Certification](#) [4/05/95]

KEY WORDS: *RES JUDICATA, *LAW OF THE CASE, *CLASS ACTION.

Renewed motion for class certification denied. Original denial dispositive and in any event the typicality requirement for class certification is not met because of factual differences among potential claims.

[Order Regarding Intervention and Attorney Lien](#) [3/08/95]

KEY WORDS: *ATTORNEY FEES, *ATTORNEY LIEN, *INTERVENTION, *RULE 24, MONT.R.CIV.P.

Where attorney asserts lien with regard to benefits which may become due to claimants he does not represent, affected claimants may intervene to oppose the lien. Broader intervention denied since intervenors failed to show common issues of fact or law with respect to other matters. Asserted lien places insurer in a dilemma and it is entitled to protect its own interests.

LINDA BYUN v. MT SCHOOLS GROUP INS. AUTHORITY/TROY PUBLIC SC HOOL
WCC No. 9407-7085

[Order Awarding Costs](#) [12/04/95]

KEY WORDS: *KLOEPFER, *COSTS, *TRANSCRIPTS.

Expert witness fee recoverable under *Kloepfer*. Travel recoverable by agreement of Rules Committee and for reasons similar to allowing recovery of expert fees. Cost of trial transcript allowed but will NOT be allowed in the future unless prepared for an appeal or at the specific request of the Court. Transcripts are unnecessary for the Court to render a decision.

[Findings of Fact, Conclusions of Law and Judgment](#) [6/21/95]

KEY WORDS: *RELATEDNESS, *CAUSATION, *THORACIC OUTLET SYNDROME,
*CONFLICTING MEDICAL OPINION.

While medical testimony was conflicting, the Court found that claimant suffers from Thoracic Outlet Syndrome (TOS) which is attributable to her industrial accident (a fall). Treating physician's opinion adopted where differences in medical opinions based on different philosophies regarding the existence and etiology of TOS and the reasons for the different philosophies were not explained. Medical expenses and temporary total benefits ordered.

[Order Regarding Motion to Compel](#) [12/5/94]

KEY WORDS: *DISCOVERY, *MOTION TO COMPEL, *INTERROGATORIES,
*PRODUCTION, *TAX RETURNS.

Detailed comprehensive answer to interrogatory unnecessary where information has been provided in deposition. However, answer should disclose whether deposition information complete, and if not, it should provide supplementary information necessary to make it complete. Tax returns irrelevant to total rehabilitation benefits. Motion to compel them denied.

MARION J. DARLING v. KALISPELL REGIONAL HOSPITAL

WCC No. 9505-7314

[Findings of Fact, Conclusions of Law and Judgment](#) [12/04/95]

KEY WORDS: *AGGRAVATION, *SUBSEQUENT INJURY, *MEDICAL TESTIMONY.

Industrial accident permanently aggravated claimant's underlying osteoarthritis of her back. Attorney fees and penalty denied.

LIBERTY NW INS. CORP. v. GERALD A. BURCH

WCC No. 9506-7327

[Order and Judgment](#) [11/27/95]

KEY WORDS: *SUBSEQUENT INJURY, *SUBSEQUENT OCCUPATIONAL DISEASE,
*INDEMNIFICATION.

First insurer at risk ordered to reimburse second insurer where evidence established that the claimant's shoulder condition was due to a natural progression of his original injury rather than a new injury or occupational disease.

LORETTA J. DELANEY v. LANTIS ENTERPRISES d/b/a FRIENDSHIP VILLA

WCC No. 9508-7373

[Findings of Fact, Conclusions of Law and Judgment \[11/27/95\]](#)

KEY WORDS: *NOTICE, *39-71-603.

Petition denied because claimant failed to give her employer notice within 30 days as required by section 39-71-603, MCA. Claimant and her witness were not credible.

ED HAAG v. MONTANA SCHOOLS GROUP INS. AUTHORITY

WCC No. 9210-6598

Haag v. School Dist. No. 1, Great Falls Pub. Schs., 274 Mont. 109, 906 P.2d 693 (1995)
REVERSED/REMANDED 11/21/95; REHEARING DENIED

KEY WORDS; *39-71-606, *OVERRULE/REVERSE PREVIOUS DECISION, *FRAUD

Overruling its previous decision in *Solheim v. Tom Davis Ranch*, 208 Mont. 265, 677 P.2d 1034 (1984) the Supreme Court finds that failure of an insurer to accept or deny a claim within 30 days results in the claim being “deemed accepted as a matter of law.” Before insurer could sustain a claim of fraud it would be required to plead and prove each of the nine elements of fraud.

[Findings of Fact, Conclusions of Law and Judgment \[11/30/94\]](#)

KEY WORDS: *CREDIBILITY, *FALSE CLAIMS.

Claimant, a janitor at an elementary school, did not suffer an industrial injury to his shoulder. His shoulder problems were preexisting and he fabricated his worker's compensation claim after being suspended from work following a disciplinary incident at school.

JAMES KELLY COAKLEY v. OLSTEN STAFFING & McCALL POOLS

WCC No. 9504-7268

[Order Denying Motion for Judgment on the Pleadings \[11/16/95\]](#)

KEY WORDS: *JUDGMENT ON THE PLEADINGS, *PLEADING.

Motion for judgment on pleadings denied where allegations made in response and briefs fairly raises issue. Court declines to adopt a hyper-technical approach to pleading.

[Order Dismissing Claim Regarding Treating Physician \[10/31/95\]](#)

KEY WORDS: *MEDIATION, *MOTION TO DISMISS.

Claim regarding right to change treating physician dismissed where not mediated. Claimant's assertion that claim was mediated is contradicted by mediation petition and determination.

BRAD CERTAIN v. PPG INDUSTRIES, INC.

WCC No. 9505-7298

[Judgment](#) [11/6/95]

KEY WORDS: *INDEMNITY AWARD, *PERMANENT PARTIAL DISABILITY,
*39-71-703 (1985)

Claimant awarded 25% disability under old law sections 39-71-703 to -709, MCA. Claimant, a glass installer, has low-back injury which decreases his ability to compete. Although he now owns his own shop and makes more money than at time of injury, his injury has caused him to limit his business, thus diminishing profit opportunities. It would also be difficult for him to compete on open labor market.

VERNON L. INGEBRETSON v. LOUISIANA-PACIFIC CORP.

WCC No. 9403-7030

[Order Granting Attorney Fees and Costs](#) [11/06/95]

KEY WORD: *ATTORNEY FEES

Attorney fees of \$12,900 awarded claimant. Under 1987 WC amendments, hourly rate limited to \$75 an hour, which is the maximum amount established by Department rule. Hours spent in establishing amount of fees disallowed. Hours spent which were more than 30 days prior to written fee agreement were also disallowed. Prior attorneys fees for non-overlapping services allowed.

[*Ingebretson v. Louisiana-Pacific Corporation*, 272 Mont. 294, 900 P.2d 912 \(1995\).](#)
AFFIRMED - AUGUST 10, 1995. Justice Turnage. (Heberling/Schuster)

KEYWORDS: *ATTORNEY FEES, *COSTS, *ISSUES IN PRETRIAL ORDER,
*JURISDICTION, *PENALTY, *TEMPORARY TOTAL DISABILITY, *DISCHARGE.

WCC did not abuse discretion when deciding claimant's discharge was a pretext to get rid of employee. Pretrial Order should be liberally construed to permit any issues at trial that are "embraced within its language." citing *Nentwig* (1992) 256 Mont. 134. Claimant meets 2 prong test for TTD set out in *Kramer v. EBI* 265 Mont. 525 (1994). Claimant prevails on attorney fees, costs and the penalty. **Distinguishes** *Wunderlich v. Lumbermens*, (Mont. 1995), as this is benefit dispute not an appeal from order by Department.

[Order Granting Stay of Execution and Judgment](#) [1/12/95]

KEY WORDS: *STAY OF EXECUTION, *SUPERSEDEAS BOND

Stay of execution of judgment granted to self-insurer where its actions indicate it will expeditiously prosecute its appeal. Bond requirement, however, was not awarded.

[Findings of Fact, Conclusions of Law and Judgment \[12/14/94\]](#)

KEY WORDS: *ALTERNATIVE EMPLOYMENT, *ATTORNEY FEES, *DISCHARGE, *MODIFIED EMPLOYMENT, *OCCUPATIONAL DISEASE, *PENALTY, *TEMPORARY TOTAL DISABILITY BENEFITS, *39-71-703(4)(1991).

Claimant entitled to temporary total disability benefits where alternative job under 39-71-703(4) ended despite termination of employment for alleged cause where termination was pre-textual and due to injury. Section 39-71-703(4)(1987) provision for alternative employment applies to Occupational Disease Act. Penalty & attorney fee awarded. *Ingebretson v. Louisiana Pacific Corporation*, 52 St.Rep. 764 (1995).

[Order Denying Motion to Dismiss; Order Requiring Response \[5/2/94\]](#)

KEY WORDS: *OCCUPATIONAL DISEASE, *JURISDICTION, *39-71-2401, *39-72-612.

Court has jurisdiction as insurer waived its right to a hearing when it accepted liability after DLI made its determination that case was an OD. Mediation was satisfied and no hearing was required at DLI

RENE ANNE HARBALL v. J.C. PENNEY CO.
WCC No. 9508-7369

[Order Denying Independent Medical Examination and Staying Further Proceedings \[11/03/95\]](#)

KEY WORDS: *IME, *IMPAIRMENT RATINGS.

Independent medical exam request by insurer denied where purpose of IME is to render an impairment rating. The IME physician has already rendered such rating based on a records review, and the impairment rating is subject to the special procedure in effect in 1991 which call for the Department to appoint an independent evaluator. Case stayed pending exhaustion of special procedure.

WILLIAM BURGAN v. CENEX
WCC No. 9505-7308

[Order Awarding Costs \[11/03/95\]](#)

KEY WORDS: *COSTS

Consistent with *Kloepfer* (SC), *Rooney* (WCC - 10/23/95) and *Brown* (11/1/95) costs for physician's deposition preparation, photocopying, long distance telephone calls and copies of depositions used at trial awarded to claimant.

[Order Amending Judgment, Denying Petition for Rehearing \[11/03/95\]](#)

KEY WORDS: *AMENDMENT, *NEW TRIAL.

Judgment amended to reflect correct permanent partial disability rate and an offset of the impairment award previously paid. Otherwise, judgment for 250 weeks of permanent partial disability indemnity benefits confirmed. Motion for rehearing denied where no new evidence, no surprise, and Court already considered arguments.

[Findings of Fact, Conclusions of Law and Judgment \[10/4/95\]](#)

KEY WORDS: *INDEMNITY AWARD, *39-71-705 (1985), *ATTORNEY FEES, *PENALTY.

Claimant, a heavy laborer, entitled to 50% indemnity award under old law where evidence showed he works in constant pain, experiences episodes of severe totally disabling pain, and may have to undergo low-back surgery. Attorney fees and penalty awarded where the only offers made by the insurer to settle the permanent partial disability claim required claimant to release his claims to future temporary and permanent total disability benefits.

WARREN BIRD v. CITY OF LEWISTOWN/MMIA
WCC No. 9410-7159

[Order on Appeal \[11/02/95\]](#)

KEY WORDS: *TYPICALLY AVAILABLE, *OPTION (C), *PERMANENT PARTIAL DISABILITY, *COOPERATION, *MEDICAL APPROVAL, *CLEARLY ERRONEOUS, *REHABILITATION PANEL.

Department option (c) finding unsupported where evidence failed to establish that position identified for claimant was typically available. Position which has at best five or six jobs statewide and for which the last opening was three or four years ago is not typically available. Remanded for determination of next appropriate option.

DARRELL J. CHIPPEWA v. NORTH WEST PHONE SYSTEM/STATE FUND/
CHILD SUPPORT ENFORCEMENT DIVISION
WCC No. 9505-7291

[Order Dismissing Petition \[11/02/95\]](#)

KEY WORDS: *GARNISHMENT, *ATTACHMENT, *JURISDICTION.

Workers' Compensation Court does not have jurisdiction to interfere with garnishment of workers' compensation benefits.

CARRIE BROWN v. EAST COUNTY MARKET
WCC No. 9505-7315

[Order Awarding Costs \[11/01/95\]](#)

KEY WORDS: *COSTS, *EXPERT WITNESSES, *TRAVEL COSTS

Cost for testifying physician's testimony and preparation are recoverable where claimant prevailed on medical issue. Travel expenses for claimant and her children from Alaska to Montana not recoverable where sole issue was a medical one and her personal presence was not required.

PAUL LUGO v. COMMUNITY MEDICAL CENTER
WCC No. 9508-7367

[Summary Judgment](#) [11/01/95]

KEY WORDS: *WAGES, *UNEMPLOYMENT COMPENSATION.

Partial unemployment benefits are not "wages" for purposes of computing workers' compensation benefits.

DORIS OSTER v. STATE FUND
WCC No. 9509-7394

[Order Denying Motion to Dismiss](#) [10/31/95]

KEY WORDS: *FAILURE TO STATE A CLAIM, *MOTION TO DISMISS, *PLEADING.

Motion to dismiss for failure to state a claim denied. Montana is notice pleading state. Detailed factual pleading not required. Allegation of permanent total disability inherently alleges all elements of total disability. Unsubstantiated allegations contained in motion to dismiss ignored in considering motion to dismiss.

ROCKY G. ROONEY v. CREDIT GENERAL INS.
WCC No. 9411-7166

[Order Awarding Costs](#) [10/23/95]

KEY WORDS: *COSTS, *KLOEPFER

Costs of physician's fee for a deposition and of medical records, photocopies, long distance telephone and postage are recoverable in light of *Kloepfer v. Bechtel Construction Co.* This represents a change from previous WC decisions disallowing copying, telephone and postage charges. Motel bill for attendance at IME not recoverable where claimant did not spend overnight.

[Findings of Fact, Conclusions of Law and Judgment](#) [6/29/95]

KEY WORDS: *CAUSATION, *RELATEDNESS, *TREATING PHYSICIAN, *TEMPORARY

TOTAL DISABILITY BENEFITS, *MEDICAL OPINIONS, *MEDICAL PROOF

Claimant's industrial injury permanently aggravated underlying, preexisting back conditions. He did not return to his preinjury condition and is entitled to temporary total disability benefits and surgery. Current physician's testimony more persuasive where prior treating offered some support for his opinions and IME physician offered no opinion because he wanted more testing, which was not done.

JOHN H. RATHMANN v. THOMAS C. BULMAN
WCC No. 9506-7328

[Order on Appeal](#) [10/20/95]

KEY WORDS: *ATTORNEY FEE, *ATTORNEY LIEN, *DISMISSAL, *RULES OF PROFESSIONAL CONDUCT, *GOOD CAUSE.

After settling his dispute over attorney fees, the Department dismissed claimant's contested case proceeding regarding attorney fees and denied his request to vacate that dismissal. On appeal, WCC holds that claimant failed to establish good cause to vacate the dismissal. He failed to prove fraud or coercion and understood his right to consult with an independent attorney.

DRAPER v. STATE FUND
WCC No. 9403-7009

[Order for Special Trial Setting](#) [10/17/95]

KEY WORDS: *FRAUD, *STAY, *CONTINUANCE

Court will not indefinitely postpone trial even though a criminal fraud action is pending against the claimant. However, since the criminal trial is imminent (November), and the WCC cannot hear and decide the case prior to that trial, the trial will be set in December or January.

RONALD HANSEN v. NATIONAL UNION FIRE INS. OF PITTSBURGH
WCC No. 9509-7391

[Order Denying Respondent's Request for Dismissal](#) [10/17/95]

KEY WORDS: *JURISDICTION, *IME

Where treating physician recommends presurgical medical and psychological evaluation and insurer denies payment pending an IME but insists on out-of-state IME, and lacking any compelling evidence of the need for an out-of-state exam, the Court will not defer a hearing on the medical claim while the insurer pursues its IME remedies before the Department of Labor.

MONTANA SCHOOLS GROUP v. DLI/ERD

WCC No. 9309-6893

[Order Denying motion to Reconsider Order Denying Attorney Fees \[10/4/95\]](#)

KEY WORDS: *ATTORNEY FEES, *TIMELINESS, *POST-TRIAL MOTIONS, *PLEADING.

MSG's request for reconsideration of order denying attorney fees is denied. Original motion was untimely since attorney fees were not requested in pleadings and post-judgment motion was grossly untimely. *Haugen*, 240 Mont. 28, and *In re Marriage of Hill*, 265 Mont. 52, controlling.

[Order Denying Attorney Fees \[9/27/95\]](#)

KEY WORDS: *ATTORNEY FEES, *TIMELINESS

Motion for attorney fees and costs by MSG denied as untimely. The request was filed three months after Judgment had already been entered. MSG did not previously request either attorney fees or costs.

[Order on Appeal \[6/16/95\]](#)

KEY WORDS: *ADMINISTRATIVE PROCEDURE, *RULEMAKING, *EQUAL PROTECTION, *DUE PROCESS, TAXES, *CONSTITUTIONAL LAW, *PLANS

Method of assessing fees on self-insured employers, insurers and State Fund to pay for government operations related to workers' compensation does not deny Montana Schools Group, which is a self-insured group of schools, due process or equal protection. The methodology, however, constitutes a rule and is invalid because of DLI's failure to adopt it through formal rulemaking proceeding.

JERRY G. McNEESE v. STATE FUND

WCC No. 9508-7368

[Order Denying Motion to Dismiss, Staying Proceedings & Requiring Further Action by the Parties \[10/3/95\]](#)

KEY WORDS: *MEDIATION, *INDEPENDENT MEDICAL EXAMINATION.

Proceedings stayed where mediator has not issued recommendation because of parties' agreement to await a medical exam. Since claimant has since repudiated the agreement, the mediator shall issue his recommendation within ten days. Court may order medical exam but has no jurisdiction at present to do so. When mediation completed, action may be reactivated.

JOHN HARDING v. WAUSAU

WCC No. 9504-7285

[Order Adopting Findings of Fact, Conclusions of Law and Judgment](#) [9/27/95]

KEY WORDS: *PERMANENT PARTIAL DISABILITY, *REHABILITATION BENEFITS, *39-71-703, *ATTORNEY FEES, *PENALTY.

July 6, 1994 injury resulted in additional physical restrictions being placed on claimant's work. Previously he could do heavy labor, now he can only do medium labor. Pursuant to section 39-71-703, MCA (1993), he is entitled to 15%. Rehabilitation benefits denied for lack of evidence. Insurer's conduct not unreasonable: Attorney fees and penalty **denied**.

GERARD WILSON v. LIBERTY MUTUAL FIRE INS.

WCC No. 9405-7059

Wilson v. Liberty Mut. Fire Ins., 273 Mont. 313, 903 P.2d 785 (1995). **AFFIRMED 9/26/95 - REHEARING DENIED**

KEY WORD: *SUBSTANTIAL EVIDENCE

[Findings of Fact, Conclusions of Law and Judgment](#) [2/3/95]

KEY WORDS: *CAUSATION, *RELATEDNESS.

Claimant failed to demonstrate that his current back condition is related to two prior back injuries which occurred in 1986 and 1988. The Court is persuaded that the prior injuries were back strains each of which resolved within a few weeks.

CNA INSURANCE COMPANIES v. KENNETH RAYLON DUNN/UEF

WCC No. 9411-7186

CNA Ins. Co. v Dunn, 273 Mont. 295, 902 P.2d 1014 (1995). **AFFIRMED 9/21/95.**

KEY WORDS: *SANCTIONS, *DECLARATORY JUDGEMENT, *CONSTITUTIONAL LAW, *39-71-515, 516, *JURISDICTION, *FRIVOLOUS APPEAL

Supreme Court agrees with result of WCC decision, but not reasoning. Citing *Bohmer*, 266 Mont. 289, affirmed. CNA had various other remedies available in district court. Supreme Court sanctions CNA and its attorney for a frivolous appeal.

[Order & Judgment Dismissing Petition](#) [3/20/95]

KEY WORDS: *DECLARATORY JUDGMENT, *UNINSURED EMPLOYER, *JURISDICTION, *DISTRICT COURT.

Petition by insurer for declaratory judgment that its policy covered industrial accident dismissed where claimant has filed separate action against employer alleging that the

employer was uninsured, the alleged insurance policy surfaced only after the law suit was filed, and the WCC action was filed 9 months after the law suit.

BRETT BRINEY v. STAUFFER CHEMICAL
WCC No. 9410-7160

____ Mont. _____, _____ P.2d _____, _____ St.Rep. _____ (1997). **REVERSED AND REMANDED, 6/ 24/97**

KEY WORDS: *BURDEN OF PROOF, *PENALTY, *HOLTEN, *WALKER, *PROXIMATE CAUSE, *AGGRAVATION, *MEDICAL OPINIONS

Supreme Court reviews the medical depositions and finds that the “undisputed, substantial evidence establishes that Briney’s current physical impairment and disability is primarily attributable to the injury . . . on May 24, 1981.” Insurer failed to prove that some intervening act was cause of claimant’s disability, per *Walker v UPS* (1993).

[Findings of Fact, Conclusions of Law and Judgment](#) [9/18/95]

KEY WORDS: *PROXIMATE CAUSE, *AGGRAVATION, *MEDICAL OPINIONS

Claimant, who suffered a series of back pain producing incidents over a period of 12 years, failed to prove that his current, disabling low-back condition was proximately caused by a 1981 injury. Medical testimony established that his condition was more likely the cumulative consequence of a series of injuries and that he probably could have continued working absent the additional injuries. Permanent partial disability benefits denied.

JANET STRICKLAND v. STATE FUND
WCC No. 9309-6901

Strickland v. Joseph W. Tackett, 273 Mont. 254, 901 P.2d 1391(1995). **AFFIRMED 9/14/95**

KEY WORDS: *SUBSTANTIAL EVIDENCE

[Findings of Fact, Conclusions of Law and Judgment](#) [10/6/94]

KEY WORDS: *COURSE AND SCOPE, *ERRAND, *TRAVEL, *TRAVELING, *39-71-407(3).

Automobile accident which occurred while claimant was returning to work from a personal errand did not occur in the course and scope of employment and is not compensable. §39-71-407(3), MCA.

STEVE KASTELLA v. PLUM CREEK TIMBER CO.

WCC No. 9501-7214

[Order Denying Motion for Reconsideration of Court's Decision and Judgment on Appeal](#)
[9/13/95]

KEY WORDS: *RECONSIDERATION.

[Decision and Judgment on Appeal](#) [6/30/95]

KEY WORDS: *OCCUPATIONAL DISEASE, *JURISDICTION, *OCCUPATIONAL DISEASE PANEL, *APPORTIONMENT, *COMMUNICATIONS TO PHYSICIANS, *ATTORNEY FEES, *39-72-706, *39-72-303, *39-72-613.

Occupational disease apportionment issue. Held: Disputed liability compromise settlement of workers' compensation claim for alleged 1989 back injury did not preclude consideration of pre-1989 occupational contribution to claimant's occupational back disease. Department decision limiting consideration of occupational contribution to post-1989 is reversed. Ex parte communications to occupational disease panel determined to be improper. Remanded for determination of attorney fees and costs.

SUE YARDE v. LIBERTY NW INS.

WCC No. 9503-7214

[Findings of Fact, Conclusions of Law and Judgment](#) [9/7/95]

KEY WORDS: *39-71-2001, *REHABILITATION BENEFITS, *WAGES, *ATTORNEY FEES, *PENALTY, *AGGRAVATION.

Claimant not entitled to benefits based on overtime hours where she worked less than four weeks and was not required to work overtime but was told that she could do so if she wished. She is entitled to rehabilitation benefits to allow her to complete studies to become a medical transcription since her labor market was restricted by her injury and preexisting allergies make employment at other jobs iffy. Attorney fees/penalty denied.

RONALD L. HULFORD v. STATE FUND

WCC No. 9501-7212

[Order on Appeal](#) [9/7/95]

KEY WORDS: *REHABILITATION OPTIONS, *REHABILITATION PANEL, *JUDICIAL REVIEW, *CLEARLY ERRONEOUS, *CREDIBILITY, *39-71-1012.

DLI hearing examiner's decision finding that option (c) — return to work in an alternative occupation — is the first appropriate option for claimant where panel found option (e) — retraining the first appropriate option and that option was supported by other evidence.

Examiner's reliance on vocational counselor's testimony misplaced where he misapprehended her testimony and she repudiated her original recommendation without explaining why.

JOLANDA "SUSIE" GLAUDE v. STATE FUND
WCC No. 9407-7094

[Order Granting Motion to Compel, Deferring Motion for Summary Judgment and Requiring Amended Response](#) [9/5/95]

KEY WORDS: *DISCOVERY, *MOTION TO COMPEL, *ATTORNEY FEES, *RELEVANCE.

Motion to compel responses to interrogatories and requests for production regarding claimant's employment and earnings since 1989 is **granted** where the claimant's status (employee or independent contractor) is at issue. Requests deemed relevant and not over-broad or burdensome. Attorney fees are discretionary and are denied.

Glaude v. State Fund, 271 Mont. 136, 894 P.2d 940 (1995). **REVERSED/REMANDED 5/4/95.**

KEY WORDS: *FAILURE TO STATE A CLAIM, *RULE 12(b)(6)

Supreme Court citing to *Boreen*, 884 P.2d at 762, "dismissal is justified only when the allegations of the complaint itself clearly demonstrate that the plaintiff does not have a claim."

[Order Dismissing Petition](#) [9/21/94]

KEY WORDS: *STATUTORY INTERPRETATION *UNINSURED SUBCONTRACTOR, *UNINSURED CONTRACTOR, *39-71-405.

Immediate employer of uninsured independent contractor is liable for benefits due to the contractor's injured employee, § 39-71-405(1), but employers or contractors higher up in a linear chain of contractors and subcontractors are not liable even though the immediate employer is also uninsured.

BUD STRODE v. STATE FUND
WCC No. 9408-7127

[Order and Judgment Dismissing Appeal](#) [8/31/95]

KEY WORDS: *MOOT, *MOOTNESS

Appeal from Department decisions regarding 49 days of additional temporary total disability benefits and appointing impairment evaluators dismissed where claimant entered into a FULL AND FINAL COMPROMISE SETTLEMENT of his claim, thereby rendering his appeal

moot.

JERRY ELAM v. STATE FUND
WCC No. 9502-7239

DISMISSED AND REMANDED FOR FINAL DISPOSITION 1/25/96.

[Order on Appeal \[8/25/95\]](#)

KEY WORDS: *REHABILITATION OPTIONS, *CREDIBILITY, *DECONDITIONING, *39-71-1012 (1987).

DLI decision finding option (d) — on-the-job retraining — the first appropriate rehabilitation option for claimant affirmed where the job was approved by claimant's physician and claimant had engaged in "self-limiting" pain behavior which the hearing examiner found to be over done.

PATTY STOLLER v. STATE FUND
WCC No. 9507-7339

[Order Denying Motion to Dismiss \[8/10/95\]](#)

KEY WORDS: *MEDIATION, *JURISDICTION

Motion to dismiss for failure to give mediator notice of rejection of written recommendation denied. However, statute requires such notice prior to petitioning the Court. Failure of counsel to do so in the future may result in dismissal or vacating the trial date until notice is given.

DONNA TURJAN v. VALLEY VIEW NURSING HOME
WCC No. 9303-6752

[Turjan v. Royal Insurance](#), 272 Mont. 386, 901 P.2d 76 (1995). **AFFIRMED - AUGUST 7, 1995.** Justice Hunt. (Bulman/Scott, P. Mars)

KEY WORDS: *AGENCY, *ESTOPPEL, *NOTICE, *WRITTEN CLAIM, *601(1985), *603 (1985).

The one-year SOL for filing a written claim and the 60-day notice of injury to the employer is in effect while claimant is receiving benefits under a prior claim. Claimant did not report her second injury to her supervisor within 60 days, nor file a claim for compensation. *Frost* and *Jaeger* are distinguishable.

[Findings of Fact, Conclusions of Law and Judgment \[11/3/94\]](#)

KEY WORDS: *AGENCY, *ESTOPPEL, *NOTICE, *WRITTEN CLAIM.

WCC found: Claim not compensable where claimant failed to notify her employer within

the time required by law and failed to file a written claim within time required by law. Representatives of insurer for prior injury not agents for employer or different insurer with respect to later injury.

JAMES MCCLURE v. STATE FUND
WCC No. 9304-6772

McClure v. Blaze Constr., Inc., 272 Mont. 94, 899 P.2d 1093 (1995) **REVERSED AND REMANDED 7/27/95.**

KEY WORDS: *39-71-405, *INDIANS,

Supreme Court determines that prime contractor, Blaze had an obligation to make sure that all operations under the contract [with Smith, claimant's employer] were covered by Workers' Compensation Insurance. Independent contractor Smith did not have coverage, therefore the prime responsible. SC does not address other issues discussed in WC decision

[Order Denying Petition for New Trial & Certifying Judgement as Final](#) [9/7/94]

KEY WORDS: *JURISDICTION, *THIRD PARTY, *DECLARATORY JUDGMENT, *39-71-405.

WCC does not have jurisdiction over claim involving third party beneficiary interests, which is a contractual matter. Claim in essence is one for damages. WCC denied motion for reconsideration of denial of declaratory judgment order. Underlying issue involved 39-71-405(1).

JOHN A. SCHILLING v. STATE FUND
WCC No. 9503-7262

[Order Granting Motion to Stay](#) [7/26/95]

KEYWORDS: *COMPETING COURT PROCEEDINGS, *SB375, *STAY OF PROCEEDINGS.

State Fund moved to stay all proceedings so that the criminal action could be tried first. Court found good cause to continue trial on the grounds that it has the authority to stay or continue a case without looking at 1995 legislation.

SYNEK v. STATE FUND
WCC No. 9401-6989

Synek v. State Fund, 272 Mont. 246, 900 P.2d 884 (1995). **AFFIRMED - July 25, 1995** .
Justice Gray (Spear/Witte)

KEY WORDS: *CHIROPRACTIC, *39-71-704(1979), *JUDICIAL REVIEW, *SUBSTANTIAL EVIDENCE.

Chiropractic care determined to be maintenance (1979 law and rules ARM 24.29.2003-2004) Distinguishes *Weis v. Div. of Workers' Compensation*, 232 Mont. 218, 755 P.2d 1385 (1988) re: rule making authority. Argument that due process was denied per *Carmichael v. Workers' Compensation Court*, 234 Mont. 410, 763 P.2d 1122 (1988) not applicable as no new procedure or inherent delay in this case. SC declines to address what amount of time would be "reasonable."

[Order on Appeal \[8/26/94\]](#)

KEY WORDS: *CHIROPRACTIC, *DUE PROCESS, *MAINTENANCE, *RULE MAKING AUTHORITY, *ARM 24.29.2003, 2004 (1979).

DLI affirmed in its decision that chiropractic treatment was maintenance. Decision was supported by substantial evidence.

KLOEPFER v. LUMBERMENS' MUTUAL CASUALTY CO.

WCC No. 9305-6796

Kloepfer v. Lumbermens Mutual Casualty Co. 272 Mont. 78, 899 P.2d 1081 (1995).

REVERSED - July 25, 1995. Justice Weber (Edmiston/Carey)

KEY WORDS: *BAETA, *COSTS, *EXPERT WITNESS FEE, *STEVENS V STATE FUND

The cases of *Baeta v. Don Tripp Trucking*, 2554 Mont. 487, 839 P.2d 566 (1992) and *Stevens v. State Fund*, 268 Mont. 460, 886 P.2d 962 (1994) are specifically overruled as they pertain to costs for expert witnesses. Section 25-10-201, MCA, **does not govern the award of costs which may be allowed in a WC case.** Further, the application of the *Witty v. Pluid*, 220 Mont. 272, 714 P.2d 169 (1986) regarding \$10 witness fee was reversed for WCC cases.

[Order Denying Respondent's Request for Amendment \[2/23/94\]](#)

KEYWORDS: *JUDICIAL REVIEW, *AMENDING FINDINGS, *MEDICAL PROOF, *WITNESSES.

Denies insurer's motion to amend finding that doctor's testimony is discounted due to his association with employer or insurer. Each case to be decided on own merits and facts.

[Findings of Fact, Conclusions of Law and Judgment \[1/18/94\]](#)

KEY WORDS: *CREDIBILITY, *CONFLICTING MEDICAL OPINION, *OCCUPATIONAL DISEASE, *INJURY, *CAUSATION, *MEDICAL TESTIMONY, *PROOF OF MEDICAL ISSUES.

WCC finding: While enrolled in work-hardening program claimant injures back which is found to be a compensable consequence of her occupational disease. Court **does not** rely on treating physician. Finds claimant to be credible.

DAVID ROBERTSON v. STATE FUND
WCC No. 9404-7051

Robertson v. State Fund, 272 Mont. 85, 399 P.2d 1078 (1995). **AFFIRMED - July 25, 1995.** Justice Gray. (Palmer/Whyte)

KEY WORDS: *ATTORNEY FEES, *PENALTY, *WAGES, *39-71-123(1991), *39-71-701(1991).

Affirms WCC finding under facts of this case that employee's wages for workers' compensation benefit purposes must be calculated on the duration of the project and not the "hourly rate times the number of hours in a week for which the employee was hired to work." Penalty denied. Claimant's claim for 72 hour week failed, thus denial of that claim could not be unreasonable.

[Decision and Order \[1/23/95\]](#)

KEY WORDS: *PENALTY, WAGES, *39-71-123(3) (1991).

Where claimant was temporarily hired to work 12 hours a day until a project was completed, his wages must be calculated by multiplying his hourly wage by the number of hours actually worked by others who worked until the project was completed. The employer's estimate that the project might take 5 or 6 days is not controlling — 47 hours used. No penalty or attorney fees. Court's ultimate determination closer to respondent's position than to claimant's.

BOBI JO CARY v. LUMBERMENS MUTUAL
WCC No. 9407-7090

[Findings of Fact, Conclusions of Law and Judgment as to all Issues Except Claimant's Request for Penalty and Attorney Fees \[7/6/95\]](#)

KEY WORDS: *SUBSEQUENT INJURY (NON-WORK RELATED), *CHIROPRACTIC, *REHABILITATION BENEFITS, *TEMPORARY TOTAL DISABILITY BENEFITS, *NOTICE OF TERMINATION OF BENEFITS, *39-71-407(5), *39-71-609, *39-71-2001, *39-71-1014,.

1) Subsequent, non-work-related incident does not relieve insurer of liability for prior work-related back injury where the non-work-related incident does not cause permanent harm. 2) Insurer must pay for adjunctive chiropractic therapy which is found to be reasonable and approved by treating physician. 3) Claimant must repay rehab benefits received when she was not in school. 4) Insurer not entitled to reimbursement of temporary total benefits.

[Order on Motion to Disqualify Counsel \[11/7/94\]](#)

KEY WORDS: *ATTORNEYS, *DISQUALIFICATION.

Prior representation of insurer and employer not grounds to disqualify claimant's counsel absent showing that counsel represented insurer or employer in same matter or in some other case that has common facts.

[Order on Motion to Compel; Order Bifurcating Issues](#) [9/23/94]

KEY WORDS: *WORK PRODUCT, *PENALTY, *BIFURCATION, *BIFURCATE.

After *in camera* inspection, respondent insurer ordered to produce some of the documents which it claimed were protected by the work-product rule.

FRANK DeGREGORY v. EASTGATE TRUSTWORTHY HARDWARE
WCC No. 9504-7281

[Order Denying Summary Judgment](#) [7/3/95]

KEY WORDS: *MONT.R.CIV.P., *RULE 56, *SUMMARY JUDGMENT.

Summary judgment denied where motion cannot be decided prior to trial date and factual allegations may raise material issues of fact. Summary judgment procedures may not always be appropriate in WCC. Even though Court has applied Rule 56 requirement for affidavits, depositions, etc. to support motion or opposition, where party makes potentially material factual allegations without them and is unfamiliar with requirement, s/he will be provided opportunity to provide affidavits etc.

DAVID CLARKE v. SCOTT MASSEY d/b/a ALL SEASONS
WCC No. 9408-7131

Clarke v. Scott Massey, 271 Mont. 412, 897 P.2d 1085 (1995). **AFFIRMED 6/27/95.**

KEY WORDS: *ATTORNEY FEES, *UNINSURED EMPLOYER, *39-71-611, *39-71-515.

Section 611 does not apply to an uninsured employer.

[Order & Judgment Dismissing Petition With Prejudice](#) [1/27/95]

KEY WORDS: *ATTORNEY FEES, *UNINSURED EMPLOYER, *39-71-611, *39-71-515.

Claimant not entitled to attorney fees against uninsured employer in proceeding before the Workers' Compensation Court.

GERALD HEREIM v. FRED BRIGGS DIST. CO.
WCC No. 9406-7075

[Findings of Fact, Conclusions of Law and Judgment](#) [6/27/95]

KEY WORDS: *CAUSATION, *RELATEDNESS, *SUBSEQUENT INJURIES, *BURDEN OF PROOF

Claimant failed to prove that scar tissue discovered during unrelated back surgery was caused by either a 1975 or 1983 injury where treating doctor testified that any of six injuries could have caused scar tissue and claimant's testimony concerning continued pain was not credible. Claimant also failed to prove that the scar tissue was disabling.

TEDDY A. O'CONNOR v. WAL-MART STORES, INC.

WCC No. 9501-7213

[Order Denying Petitioner's Request for Rehearing \[6/23/95\]](#)

KEY WORDS: *NEW TRIAL

Motion for new trial denied where one issue could have been addressed at trial and the other issue is premature.

[Decision and Judgment \[5/19/95\]](#)

KEY WORDS: *RELATEDNESS, *CAUSATION, *AGGRAVATION, *PERMANENT AGGRAVATION, *REASONABLE MEDICAL TREATMENT, *MEDICAL TREATMENT, *MEDICAL OPINIONS, *CREDIBILITY

A 1993 industrial accident constituted new injury or permanently aggravated preexisting condition. Claimant entitled to retroactive temporary total disability benefits and to payment for remedial surgery. Doctor testifying live at trial provided persuasive evidence in this case.

PAUL MONTGOMERY v. DLI

WCC No. 9504-7275

[Decision On Appeal \[6/15/95\]](#)

KEY WORDS: *JURISDICTION, *ALASKA PACIFIC ASSURANCE.

DLI dismissal of petition for declaratory ruling where petitioner requested ruling that he was a permanent state employee and not a temporary employee. The petition disclosed that he was not pursuing workers' compensation or occupational disease benefits but was seeking the ruling for use in some other dispute over his wages and benefits.

CHAMPION INT'L CORP. v. JOHN BERNHARD

WCC No. 9504-7270

[Order Dismissing Petition Without Prejudice \[6/13/95\]](#)

KEY WORDS: *DECLARATORY *JUDGMENT, *MOTION TO DISMISS,

Insurer's petition to determine what may be due a claimant for old injuries dismissed as inappropriate declaratory judgment action. Cause of action belongs to claimant and insurer cannot force claimant to pursue it.

CHAMPION INT'L CORP. v. JAMES BRENNAN
WCC No. 9504-7269

[Order Dismissing Petition without Prejudice \[6/13/95\]](#)

KEY WORDS: *DECLARATORY JUDGMENT, *MOTION TO DISMISS,

Insurer's petition to determine what may be due a claimant for old injuries dismissed as inappropriate declaratory judgment action. Cause of action belongs to claimant and insurer cannot force claimant to pursue it.

DAVID WILLIAMS v. PLUM CREEK TIMBER CO.
WCC No. 9403-7017

[Order Awarding Costs on Appeal \[6/2/95\]](#)

KEY WORDS: *COSTS, *COSTS ON APPEAL.

Costs of appeal are recoverable by successful insurer. Rule that attorney fees and costs cannot be awarded an insurer applies to proceedings in WCC and does not apply to appeal. Transcript, filing fees and printing costs recoverable on appeal. Deposition fee is a trial cost and is not recoverable.

Williams v. Plum Creek Timber Co., 270 Mont. 209, 891 P.2d 502 (1995). **AFFIRMED 3/7/95.**

KEY WORDS: *39-71-116(15) 1991, *PPD, *ATTORNEY FEES, *UNREASONABLE DELAY, *39-71-703

Supreme Court construes §39-71-119(15) as amended in 1991. To be eligible for PPD a claimant must 1) have a medically determined physical restriction due to injury and 2) have a physical restriction which impairs his ability to work. No attorney fees, reasonable attempt by insurer to interpret a statute.

[Findings of Fact, Conclusions of Law and Judgment \[6/28/94\]](#)

KEY WORDS: *39-71-703, *39-71-116(15), *PPD (1991), *INJURY, *NORMAL LABOR MARKET

Claimant granted 17.5 weeks of PPD benefits. Per 39-71-116(15) claimant has a medically determined restriction and has the ability to work in normal, pre-injury labor market.

SANDRA LEE HANSON v. STATE FUND/WEST MONT
WCC No. 9403-7024

[Order on Appeal \[6/2/95\]](#)

KEY WORDS: *RELATEDNESS, *CAUSATION, *OCCUPATIONAL DISEASE,

***CARPEL
TUNNEL SYNDROME.**

Where sole medical opinion failed to attribute claimant's carpal tunnel syndrome to occupational factors, Department of Labor correctly denied her claim for benefits under the Occupational Disease Act.

MICHAEL E. HEISLER v. STATE FUND

WCC No. 9403-7015

Heisler v. State Fund, _____ Mont. _____, _____ P.2d _____, _____ St. Rep. _____ (1996)

REVERSED/REMANDED 4/24/97

KEY WORDS: *MOOTNESS, *PHYSICIANS, *CHOICE OF PHYSICIANS, *33-22-111, *33-1-102, *ARM 24.29.1511, *CONSTITUTIONAL, *RECORD ON APPEAL, *EQUAL PROTECTION, *STRATEMEYER, *PRETRIAL ORDER.

Supreme Court can consider any evidence which is a part of the record, even if it was not included in a pretrial order. Matter not moot because actions of State Fund are capable of repetition, yet evading review. Limiting physician-choice does not address the reasonableness or necessity of treatment; it reduces costs solely by prohibiting Plan 1 or 3 claimants from a privilege granted to Plan 2 claimants.

Order Denying Summary Judgment [6/1/95]

KEY WORDS: *MOOTNESS, *PRIVACY - RIGHT OF, *EX POST FACTO, *CONTRACT CLAUSE, *PHYSICIANS, *CHOICE OF PHYSICIANS, *33-22-111, *33-1-102, *WIELAND, *ARM 24.29.1511

Summary judgment denied. Requirement of prior approval to change treating physicians is not contrary to statute or unconstitutional. Prior approval requirement not moot even though subsequent to filing of petition, the insurer approved the change and paid all medicals since same situation could occur in the future.

GARY WINGFIELD v. STATE FUND

WCC No. 9502-7243

Order Remanding for Further Evidence [5/19/95]

KEY WORDS: *FURTHER EVIDENCE, *REMAND TO AGENCY FOR FURTHER EVIDENCE

Case remanded to DLI for evidence regarding first appropriate rehabilitation option where decision based on old information. Hearing examiner was aware of change in medical condition and new surgery, and claimant was acting pro sé. Pro sé claimant not excused from following rules but should not be hyper technically applied. Claimant showed good grounds for failure to call doctor where insurer listed doctor as its witness.

WILLIAM L. MAGGS, JR. v. STATE FUND
WCC No. 9501-7204

[Order Granting Motion to Dismiss 1988 Claim](#) [5/16/95]

KEY WORDS: *STATUTE OF LIMITATIONS, *WAIVER OF STATUTE OF LIMITATIONS,
*JURISDICTION, *MOTION TO DISMISS, *39-71-601, *39-71-2905, *39-71-2401.

Court lacks jurisdiction to extend time for filing a claim since the Department is given that jurisdiction and the Court's only role is judicial review of the Department's decision.

RICHARD AHL v. TRANSPIRATION INS. CO.
WCC No. 9502-7248

DISMISSED 10/13/95.

[Order Denying Motion for Partial Summary Judgment.](#) [5/11/95]

KEY WORDS: *SUMMARY JUDGMENT, *DISPUTED FACTS.

The rules of this Court contain no specific provision for summary judgment motions. The Court has borrowed Rule 56, Mont.R.Civ.P., and will continue to do so. Summary judgment will be granted only if the uncontroverted material facts entitle the moving party to judgment as a matter of law. The Court cannot consider representations of the parties which are not rooted in sworn evidence. Since there are material issues of disputed facts, the motion for partial summary judgment is denied.

JERRY G. McNEESE v. STATE FUND
WCC No. 9407-7084

[Decision and Order on Appeal](#) [5/5/95]

KEY WORDS: *WAIVER OF ONE-YEAR FILING REQUIREMENT, *WRITTEN CLAIM,
*STATUTE OF LIMITATIONS, *39-71-601 (2), *ESTOPPEL.

DLI order denying waiver of the one-year statute of limitations for filing a claim reversed where claimant continued working without wage loss and did not see a doctor for over two years, and then promptly filed his claim when his condition worsened and he finally sought medical care. *Conn v. Quality Inn*, 242 Mont. 190 (1990) indistinguishable.

JAMES L. SMITH v. STATE FUND
WCC No. 9303-6720

[Findings of Fact, Conclusions of Law and Judgment](#) [5/3/95]

KEY WORDS: *FRAUD, *CREDIBILITY, *MEDICAL OPINIONS, *MEDICAL EVIDENCE.

Claim for permanent total or permanent partial disability benefits rejected where claimant has engaged in a fraudulent scheme to obtain benefits and supporting medical opinions were based on claimant's fraudulent subjective complaints rather than on objective findings.

OSCAR M. JOHNSON v. TRAVELERS INS
WCC No. 9503-7254

[Order Denying Motion to Bifurcate \[4/28/95\]](#)

KEY WORDS: *BIFURCATE, *PENALTY

Respondent has not established any unusual circumstance which would move the Court to bifurcate the penalty issue. The Court will bifurcate the penalty issue only where pretrial disputes involving penalty threaten to overshadow, if not swallow up, the underlying dispute.

JERRY PINYERD v. STATE FUND
WCC No. 9405-7065

[Consent to Judgment](#)

Pinyerd v. State Fund, 271 Mont. 115, 894 P.2d 932 (1995). **REVERSED - REMANDED 4/25/95.**

KEY WORDS: *ASSAULT, *COURSE AND SCOPE.

There was a reasonable connection between the injury suffered by the claimant and the employment or the condition under which it was pursued. Co-employee resented claimant's sales success. Evidence established that employer's policies created friction among its sales staff and there was cause for animosity.

[Findings of Fact, Conclusions of Law and Judgment \[9/20/94\]](#)

KEY WORDS: *ASSAULT, *COURSE AND SCOPE.

WCC found that assault at work by a fellow employee did not occur in course of employment where the assailant's immediate motivation was his belief that claimant had taken something from him and his more general motivation was his hostility towards Californians. *Penny v. Anaconda Co.*, 194 Mont. 409 (1981) applied.

CHARLES RASMUSSEN v. STATE FUND
WCC No. 9212-6647

Rasmussen v. Heebs Food Center, 270 Mont. 492, 893 P.2d 337 (1995). **APPEALED GRANTING OF NEW TRIAL - REVERSED ON APRIL 20, 1995 AND ORIGINAL WORKER'S COMPENSATION COURT'S FF & CL REINSTATED.**

KEY WORDS: *JUDICIAL ADMISSIONS, *ESTOPPEL, *ABUSE OF DISCRETION,
*NEW
TRIAL *FRAUD,

Supreme Court reverses and reinstates original findings and conclusions. Based on principles of estoppel and judicial admissions, SC concluded WCC had manifestly abused its discretion in granting State Fund a new trial. State Fund bound by defense counsel's statements during trial.

[Order Granting New Trial \[7/28/94\]](#) .

KEY WORDS: *NEW TRIAL, *25-11-102, *CREDIBILITY, *BURDEN OF PROOF,
*PERMANENT TOTAL BENEFITS, *NORMAL LABOR MARKET, *PAIN,
*EVIDENCE.

New trial granted based on 25-11-102(1)(3). Insurer had failed to plead an affirmative defense of fraud in underlying case. Claimant essentially "acquiesced" to motion when he presumes WCC had considered the "credibility issue" in its FF/CL/JUDGMENT.

[Findings of Fact, Conclusions of Law and Judgment \[5/18/94\]](#)

KEY WORDS: *PERMANENT TOTAL DISABILITY, *FRAUD, *CREDIBILITY, *BURDEN
OF PROOF, *39-71-116(13), *EXPERT WITNESS, *CIVIL PROCEDURE
(DEFENSES), *EVIDENCE, *PRETRIAL ORDER, *AFFIRMATIVE DEFENSE.

Claimant proved he was PTD within the requirements of *Metzger (1984)* and *Spooner (WCC - 1983)*. His injury was the proximate cause of his disabling condition. *Eastman (1992)* Court would not consider evidence which indicated fraud as respondent had not pled as affirmative defense.

PAULA MOORE v. STATE FUND
WCC No. 9405-7079

Moore v. Davis Maintenance Co., Slip Op. 95-218. **AFFIRMED - NONCITEABLE**

[Findings of Fact, Conclusions of Law and Judgment \[4/17/95\]](#)

KEY WORDS: *AGGRAVATION, *INJURY, SUBSEQUENT INJURY, *ACCIDENT,
*39-71-407 (1991), *39-71-119 (1991), *REASONABLENESS, *ATTORNEY FEES,
*PENALTY.

Insurer not relieved from liability for condition caused by industrial accident where non-work-related activities during a single day cumulatively cause a flare of the condition. To constitute a new injury there must be a specific identifiable trauma or event during a single work shift. A flare up caused by activity but with no specific trauma or incident does not constitute a new injury. Fees and penalty denied..

LIBERTY NORTHWEST INS. v. PATRICK BEVIS and STATE FUND
WCC No. 9406-7073

[Findings of Fact, Conclusions of Law and Judgment \[4/17/95\]](#)

KEY WORDS: *INDEMNIFICATION, *SUBSEQUENT INJURY, *MAXIMUM HEALING, *AGGRAVATION, *TEMPORARY AGGRAVATION, *PERMANENT AGGRAVATION, *NOTICE, *39-71-603, *MEDICAL OPINIONS, *MEDICAL TESTIMONY.

Second insurer entitled to indemnification where evidence demonstrated that subsequent injury resulted in no permanent harm and amounted to a temporary aggravation of an underlying condition caused by an industrial accident covered by the first insurer. Claimant's notice to second insurer also untimely where he timely reported incident but specifically claimed he had not been hurt.

PETE MAVITY v. CHAMPION INTERNATIONAL
WCC NO. 9502-7233

[Order Regarding Expert Witnesses \[4/13/95\]](#)

KEY WORDS: *EXPERTS, *SANCTIONS.

Motion regarding admissibility of expert testimony deferred until trial. Counsel cautioned about pretrial gamesmanship and warned that Court will impose sanctions for abuse.

PATRICIA SULLIVAN v. AETNA LIFE & CASUALTY
WCC No. 9309-6889

Sullivan v. Aetna Life & Casualty, 271 Mont. 12, 894 P.2d 278, (1995). **AFFIRME D 4/12/95.**

KEY WORDS: *LUMP SUM, *BEST INTERESTS, *BURDEN OF PROOF, *ABUSE OF DISCRETION, *DISSENT.

Supreme Court finds that the WCC did not abuse its discretion in denying lump sum.

[Order denying Request for Rehearing & to amend Court's Order](#)
[Findings of Fact, Conclusions of Law and Judgment \[4/21/94\]](#)

KEY WORDS: *LUMP SUM, *BEST INTERESTS, *BURDEN OF PROOF, *CREDIBILITY.

Claimant totally disabled and seeking a lump sum advance which was denied, as she failed to prove it was in her best interests. Does not manage money well and may have been confused, therefore not too credible.

KEVIN IRISH v. STATE FUND

WCC No. 9303-6741

DISMISSED 5/14/96

[Findings of Fact, Conclusions of Law and Judgment](#) [4/10/95]

KEY WORDS: *TEMPORARY TOTAL DISABILITY, *TERMINATION OF BENEFITS,
*STATUTORY INTERPRETATION, *MEDICAL EVIDENCE,
*REASONABLENESS,
*ATTORNEY FEES, *PENALTY, *92-615, RCM, *39-71-609.

Despite failure of insurer to give statutory 15 days advance notice of termination of benefits, claimant not entitled to temporary total disability benefits retroactive to 1977 since he returned to work and had no wage loss. *Clark* and *Catteyson* cases distinguished. However, claimant entitled to medical benefits since unrefuted medical evidence showed that his current condition is the result of his 1977 injury..

MICHAEL STERMITZ v. STATE FUND

WCC No. 9311-6928

[Order Denying Petition for Lump Sum](#) [4/6/95]

KEY WORDS: *LUMP SUM.

This petition was filed as a continuation of the present case and not a new matter. Since no lump sum request was previously made, the lump sum petition must be filed as a new matter and the present petition is denied.

[Findings of Fact, Conclusions of Law and Judgment](#) [1/12/95]

KEY WORDS: *LOST EARNING CAPACITY, *PERMANENT PARTIAL DISABILITY BENEFITS, *39-71-703 (1985).

Claimant, who suffered a back injury and underwent a diskectomy, awarded \$23,000 in permanent partial disability benefits (lost earning capacity -- pre-1987) where he returned to his time-of-injury job but has lost efficiency in performing that job. Claimant also lost access to higher paying, heavy labor construction jobs.

[Order Denying Motion to Reopen](#) [12/21/94]

KEY WORDS: *EVIDENCE, *REOPEN.

Motion to reopen record in submitted case denied where ground for the motion was change in employment and there is no indication of a change in condition. This is an old law case. Comprehensive evidence of earning capacity has already been submitted.

KIM WUNDERLICH v. LUMBERMENS MUTUAL CASUALTY. CO.

WCC No. 9310-6907 (PPD Benefits)

WCC No. 9310-6915 (Atty Fees & Costs, Penalty)

Wunderlich v. Buttrey Food & Drug, 270 Mont. 404, 892 P.2d 563 (1995). **AFFIRME D 3/31/95.**

KEY WORDS: *SUBSTANTIAL EVIDENCE, *OCCUPATIONAL DISEASE, *PENALTY, *WORKERS' COMPENSATION

Substantial evidence supports WCC conclusion that claimant did not establish a claim for lost earning capacity as a result of 87 injury. WCC's jurisdiction under workers' compensation act can not be superimposed or override its limited jurisdiction under the occupational disease act.

[Order Amending Findings of Fact, Conclusions of Law and Judgment Findings of Fact, Conclusions of Law and Judgment \[6/28/94\]](#)

KEY WORDS: *PENALTY, *ATTORNEY FEES, *OCCUPATIONAL DISEASE, *PPD, *39-71-2907, *39-71-703 (1987).

Employer was unreasonable, but the penalty provisions of 2907, do not apply to the occupational disease act, therefore no attorney fees. Also, WCC will not expand holding in *Handlos* (1990) which awarded penalty for unreasonable delay until "mid-trial" In this case payment was made prior to filing of petition. Uncontroverted medical opinions that claimant's condition was work-related.

JOYCE MOORE v. STATE FUND/BRANDIN IRON MOTEL
WCC No. 9305-6783

[Findings of Fact, Conclusions of Law and Judgment \[3/24/95\]](#)

KEY WORDS: *NOTICE, *CREDIBILITY, *39-71-603.

Claimant's claim for compensation barred on account of her failure to provide her employer notice within 30 days. Credibility issues resolved in favor of employer.

ROBERT B. MUTCHIE v. TVX MINERAL HILL MINE
WCC No. 9411-7185

[Partial Decision \[3/08/95\]](#)

KEY WORDS: *SCOPE AND COURSE, *CLOTHES, *39-71-407(1993)

Partial judgment entered holding that claimant was in the course and scope of his employment at the time he felt his back "pop" while putting on his work clothes. Claimant, a miner, was in changing room provided by employer, although his pay did not start until he entered the mine portal and he was not required to change clothes at work.

[Order Compelling Discovery \[1/20/95\]](#)

KEY WORDS: *CLAIM FILE, *DISCOVERY, *SURVEILLANCE.

Insurer ordered to produce redacted portions of claims adjuster's notes and memos. Insurer's file not automatically protected by work-product rule. Information regarding surveillance ordered produced after claimant is deposed.

LEWIS KARSTETTER v. LAKE MILLING, INC.
WCC No. 9502-7240

[Order Clarifying Mediation Requirement; Order Denying Motion to Dismiss \[3/3/95\]](#)

KEY WORDS: *MEDIATION.

Under mediation statutes, either party may petition the Court as soon as either rejects the mediator's recommendation. The 45 day requirement only sets a deadline by which the parties accept or reject the recommendation and does not prevent filing before 45 days so long as the mediator is notified of the rejection.

DONALD SIMPSON v. LEWIS AND CLARK COUNTY
WCC No. 9312-6964

[Decision and Order Granting Summary Judgment \[2/16/95\]](#)

KEY WORDS: *CONSTITUTIONAL LAW, *EQUAL PROTECTION, *DUE PROCESS,
*CRUEL AND UNUSUAL PUNISHMENT, *COMMUNITY SERVICE.

Statute providing medical benefits and impairment awards but not temporary total, permanent partial, permanent total or rehabilitation benefits to workers performing community service pursuant to a court-imposed criminal sentence does not violate the Equal Protection or Due Process clauses or the prohibition against cruel and unusual punishment.

GEORGE FRISBIE v. CHAMPION INTERNATIONAL
WCC No. 9403-7012

DISMISSED MAY 16, 1995.

[Findings of Fact, Conclusions of Law and Judgment \[2/10/95\]](#)

KEY WORDS: *ALCOHOLISM, *CONFLICTING MEDICAL OPINION, *MEDICAL
OPINIONS, *PERMANENT TOTAL DISABILITY.

Claimant failed to persuade the Court that he is permanent totally disabled on account of his back injury. Opinions of two back specialists, one of whom testified in person, adopted over that of the treating family practitioner. Claimant's pain is magnified by his alcoholism and lack of motivation. Alcoholism is presently disabling but unrelated to injury.

SHANE LEONARD BECKERS v. STATE FUND

WCC No. 9407-7098

[Findings of Fact Conclusions of Law and Judgment \[2/8/95\]](#)

KEY WORDS: *AGGRAVATION, *ATTORNEY FEES, *CAUSATION, *MAXIMUM MEDICAL HEALING, *PENALTY, *RELATEDNESS.

Based on three unrefuted medical opinions and the history of claimant's complaints and treatment, degenerative condition of claimant's neck was caused by an industrial accident which occurred in 1987. Attorney fees and a penalty were awarded since, in refusing to pay, the insurer disregarded unequivocal medical opinions and did not seek any independent medical advice.

JOHN A. GOMEZ v. MMIA/CITY OF MISSOULA

WCC No. 9411-7177

[Order Granting in Part/Denying in Part the Motion to Dismiss \[1/27/95\]](#)

KEY WORDS: *APPORTIONMENT, *ATTORNEY FEES, *JURISDICTION, *MEDIATION, *OCCUPATIONAL DISEASE, *TEN THOUSAND DOLLARS AWARD, *39-72-405, *39-71-611, *39-72-612, *39-72-602, *39-72-706, *39-71-2401, *39-71-2411, *39-72-402.

Motion to dismiss granted in part, otherwise denied. With some exception, the Court has jurisdiction over benefit disputes arising under the Occupational Disease Act once the insurer has accepted liability for a claim. It's jurisdiction extends to wage issues and apportionment disputes. In cases over which it has original jurisdiction, it may award attorney fees and a penalty. It does not have jurisdiction under section 39-72-405, MCA, in pre-1993 cases.

GERALD L. THAYER v. UEF/R. SMITH

WCC No. 9311-6942

[Order Denying Petition for New Trial \[1/27/95\]](#)

KEY WORDS: *INDEPENDENT CONTRACTOR, *NEW TRAIL, *RELEVANCY.

Motion for new trial denied. Relevant evidence does not have to be identified in issues section of the pretrial order. Evidence of employer's relationship with other workers was relevant in this case as it demonstrated right-of-control over project details.

[Findings of Fact, Conclusions of Law and Judgment \[12/8/94\]](#)

KEY WORDS: *CONTROL, *EMPLOYEE, *INDEPENDENT CONTRACTOR, *39-71-120, *39-71-401, *39-71-118.

Where hiring party retained right of control and dictated method and amount of payment, an employment relationship was established even though the party hired had previously engaged in an independent business, albeit on a much smaller scale.

ANR FREIGHT SYSTEMS, INC. v. GARRETT FREIGHT LINES/FARMERS
WCC No. 9411-7182

[Order Denying Motion for Summary Judgment \[1/26/95\]](#)

KEY WORDS: *AGGRAVATION, *SUBSEQUENT INJURY, *SUMMARY JUDGMENT, RULE 56, *MONT.R.CIV.P.,

Summary judgment denied in subsequent injury case where based on a single medical report and incomplete discovery. Summary judgment practice is not always appropriate in workers' compensation cases and will not be followed in cases where trial would be more economical than consideration of summary judgment motion.

LUCY OSBORNE v. PLANET INSURANCE CO.
WCC No. 9307-6842

[Order Awarding Costs \[1/26/95\]](#)

KEY WORDS: *COSTS, *MONT.R.CIV.P.

Prevailing party not entitled to reimbursement of amounts paid to doctors for time spent preparing for depositions taken at the behest of the prevailing party. Rule 26(b)(4)(c), Mont.R.Civ.P. applies only to expert witness depositions taken at the behest of the opposing party. Witness fees for vocational experts limited to \$10.

[Order Nunc Pro Tunc; Amended Findings of Fact, Conclusions of Law and Judgment \[12/19/94\]](#)

[Order Amending Conclusions of Law. \[12/14/94\]](#)

KEY WORDS: *ALTERNATIVE EMPLOYMENT, *AMENDMENT, *ATTORNEY FEES, *MODIFIED EMPLOYMENT, *NEW TRIAL, *PENALTY, *RELEASE TO RETURN TO WORK, *39-71-703(4)(1991).

Prior decision amended to clarify and eliminate penalty and attorney fees where Court overlooked critical facts.

[Finding of Fact, Conclusions of Law and Judgment \[8/22/94\]](#)

KEY WORDS: *ALTERNATIVE EMPLOYMENT, *ATTORNEY FEES, *MODIFIED EMPLOYMENT, *PENALTY, *RELEASE TO RETURN TO WORK, *TEMPORARY TOTAL DISABILITY BENEFITS, *39-71-703(4)(1991), MEDICAL EVIDENCE.

Clarification of date for retroactive benefits to begin. Release to work in alternative position pursuant to section 39-71-703(4), MCA(1991), ineffective where not adequately

communicated to claimant by her treating physicians. Company physician's release does not satisfy statute. Temporary total disability benefits awarded but penalty and attorney fees denied.

JANNA PULLIAM v. LIBERTY NORTHWEST
WCC No. 9409-7140

[Order Awarding Costs](#) [1/19/95]

KEY WORDS: *COSTS.

Costs awarded for medical records used at trial but not for an ERD file which was not used.

[Findings of Fact, Conclusions of Law and Judgment](#) [12/22/94]

KEY WORDS: *CAUSATION, *RELATEDNESS, *RIGHTNOUR, *SUBSEQUENT INJURY.

Insurer liable for initial work-related injury also liable for subsequent non-work-related injury where the subsequent injury was the result of the first and predisposed claimant to the second. *Rightnour* and *Guild* cases applied.

MARK ALLEN PETERSON v. STATE FUND
WCC No. 9312-6970

[Order Awarding Costs](#) [1/11/95]

KEY WORDS: COSTS.

Costs of \$10 per day allowed for experts. Air fares for claimant and his attorney are not allowable costs.

[Order Nunc Pro Tunc](#) [12/2/94]

[Findings of Fact, Conclusions of Law and Judgment](#) [11/23/94]

KEY WORDS: *DEPRESSION, *MEDICAL ADVICE, *PSYCHOLOGICAL CONDITIONS, *SOMATOFORM DISORDER, *TEMPORARY TOTAL DISABILITY.

Claimant is found to be temporary totally disabled due to perceived pain and depression which were triggered by a physical injury. Continuation of benefits are expressly conditions on claimant's following reasonable medical advice, including the taking of reasonably prescribed anti-depressant medications. AMENDED 12/2/94.

MONTE PERRYMAN v. STATE FUND
WCC No. 9304-6767

Perryman v. State Compensation Ins. Fund, 269 Mont. 140, 887 P.2d 254 (1994) .
AFFIRMED December 28, 1994.

KEY WORDS: *WAGE SUPPLEMENT BENEFITS, *39-71-703(1989), *39-71-123(1989),

Calculation of claimant's actual wages at the time of injury was not artificially low. WCC's application of 39-71-123, using claimant's last four pay periods is appropriate. Based on his previous training and experience claimant is capable of earning as much or more than he was earning at the time of his injury. Relied on testimony of voc/rehab counselor .

JOHN H. RATHMAN v. STATE FUND

WCC No. 9212-6637

AFFIRMED December 20, 1994 - NONCITEABLE.

PATTI POLLARI v. MACO WORKERS' COMPENSATION TRUST

WCC No. 9408-7126

[Decision and Judgment \[12/21/94\]](#)

KEY WORDS: *PERMANENT PARTIAL DISABILITY BENEFITS, *MCDANOLD, *WAGE LOSS, *39-71-703(1991).

For purposes of determining wage loss under section 39-71-703 MCA (1991), pre- and post-injury wages must be compared for the same period of time. Thus, in this case, the wage used for post-injury was the wage for that position at the time of injury, not the increased wage that claimant earned several months later when she returned to work. *McDanold* applied.

JOSEPH McCracken v. CITY OF GREAT FALLS

WCC No. 9202-6375

[Order Dismissing Petition Without Prejudice \[12/14/94\]](#)

KEY WORDS: *IMPAIRMENT RATINGS, *JURISDICTION, *39-71-711(1987).

Provision for resolution of impairment disputes by a three physician panel (39-71-71(1987)) does not apply to disputes over the relatedness of a medical condition to an industrial injury. Petition to review panel determination dismissed where issue is relatedness. Parties may mediate issue and file an original petition with the Court.

BETH RYKOWSKY v. STATE FUND

WCC No. 9411-7173

[Order Denying Motion to Dismiss; Order to Show Cause Why Sanctions Should Not be Imposed \[12/9/94\]](#)

KEY WORDS: *MEDIATION, *MOTION TO DISMISS, *SANCTIONS, *39-71-2411, *39-71-2414.

Completion of ALL mediation requirements is a prerequisite to filing a petition in the workers' compensation case arising after 7/1/87. Case continued over until the next term for failure to comply with requirement. Attorney, who knowingly filed petition without complying with requirement, ordered to show cause why sanctions should not be imposed against him.

BRANDON GJERDE v. EMPLOYERS INSURANCE OF WAUSAU
WCC No. 9408-7134

[Findings of Fact, Conclusions of Law and Judgment \[12/9/94\]](#)

KEY WORDS: **DISCOUNT, EDUCATION FACTOR, *PERMANENT PARTIAL DISABILITY, *REHABILITATION, *REHABILITATION BENEFITS, *WAGE LOSS, *WAGE LOSS FACTOR, *39-71-2001(1991), *39-71-1011(1991), *39-71-105(1991), *39-71-703 (1991).

Claimant not entitled to rehabilitation benefits under section 39-71-2001, MCA, for two additional years of schooling where evidence failed to persuade the Court that claimant had sufficient motivation to complete studies, the program would not realistically lead to the types of jobs claimant desired, and claimant's earnings would not be significantly enhanced. In computing permanent partial disability benefits, claimant entitled to an additional 20% for lost wages.

INDUSTRIAL INDEMNITY v. ROBERTA RYAN
WCC No. 9305-6795

[Order Adopting Findings of Fact, Conclusions of Law and Judgment \[11/30/94\]](#)

KEY WORDS: *BELTON, *BURDEN OF PROOF, *SUBSEQUENT INJURY.

Claimant failed to prove that her current medical condition is due to August 25, 1986 injury. She had reached maximum medical improvement prior to a second injury on April 3, 1987, and failed to establish that she suffered any separate, distinct permanent disability on account of the earlier injury. *Belton* applied.

[Order Denying All Outstanding Motions, Order Denying Certified Copies; Order Setting Trial; Order Re: Discovery; Order Denying Respondents Most Recent Motions \[1/25/94\]](#)

KEYWORDS: *PRO SE, *DEPOSITIONS, *COPIES, *ATTORNEYS.

Motions denied in a "batch." Husband cannot act as wife's attorney. Unusual case which

requires monitoring and results in variations on procedures, i.e., 21 days notice of depositions.

L aVERN F. BURNS v. PLUM CREEK .

WCC No. 9304-6757

Burns v. Plum Creek Timber Co., 268 Mont. 82, 885 P.2d 508 (1995) **AFFIRME D 11/22/94.**

KEY WORDS: *SUBSTANTIAL EVIDENCE, *CREDIBILITY

SC rejects appellants argument that sufficient evidence exists to support findings different from those made by WCC, the standard is whether findings *are supported* by substantial evidence. Emphasis on not substituting SC judgment for trial court.

[Findings of Fact, Conclusions of Law and Judgment \[3/18/94\]](#)

KEY WORDS: *INJURY, *CREDIBILITY, *39-71-407, *PROOF OF MEDICAL ISSUES, *CAUSATION.

The recurrence of a thrombosis (which the claimant had suffered earlier, non-work) was not work- related. Distinguishes *Welch (1992)*, *Plainbull (1994)* and *Prillaman (1994)*. Claimant not credible in story about prior weekend activities.

JONATHAN S. SANFORD v. STATE FUND.

WCC No. 9304-6760

Sanford v. Brandon Owens, Inc., 268 Mont. 8, 865 P.2d 444 (1994). **AFFIRME D 11/22/94.**

KEY WORDS: *SUBSTANTIAL CREDIBLE EVIDENCE

[Findings of Fact Conclusions of Law and Judgment \[3/16/94\]](#)

KEY WORDS: *REOPEN, *FULL AND FINAL COMPROMISE SETTLEMENT, *CONTRACT LAW

Claimant's request to reopen settlement denied. Good discussion of case law. Essentially claimant's basic condition was recognized and had not changed since the settlement. His inability to get work does not mean that he is medically unable to return to work.

CAROL MATHISON v. WILLIS CORRON

WCC No. 9407-7092

[Findings of Fact, Conclusions of Law and Judgment \[11/22/94\]](#)

KEY WORDS: *MEDICAL BENEFITS.

WCC cannot order insurer to pay for physical therapy where claimant's physicians have not prescribed therapy.

KELLY REINHARDT v. BILLINGS HOSPITALITY ASSOCIATES

WCC No. 9405-7054

[Findings of Fact, Conclusions of Law and Judgment \[11/22/94\]](#)

KEY WORDS: *PERMANENT PARTIAL DISABILITY, *WAGE SUPPLEMENT, *WAGES, *39-71-703 (1987).

Wage supplement benefits for part-time worker must be calculated by determining what the worker is qualified to earn post-injury on a part-time basis. Insurer's argument that a worker's pre-injury part-time wages must be compared to post-injury full-time earning capacity is rejected.

JERRY WALLACE V. STATE COMPENSATION INSURANCE FUND

WCC No. 9408-7119

[Judgment \[11/18/94\]](#)

KEY WORDS: *JUDGMENT BY STIPULATION

WCC enters judgment per stipulation of parties.

AETNA v. STATE FUND/MARLA SMITH

WCC No. 9308-6873

Aetna Casualty & Surety Company and State Compensation Insurance Fund v. In Re: Marla Smith, Slip Op. 94-605. **AFFIRMED - NONCITEABLE** Justice Leaphart. (Worm/McNeil & Adams)

[Order Amending Findings of Fact, Conclusions of Law and Judgment \[11/18/94\]](#)

KEYWORDS: *INDEMNITY, *MMI, *SUBSEQUENT INSURER, *SUBSTANTIAL EVIDENCE.

Claimant treated by 3 doctors, 2 of which found she had not reached MMI at the time of her second injury and that she would have required further treatment in spite of 2nd injury. Aetna entitled to indemnity from State Fund. Substantial evidence.

[Findings of Fact, Conclusions of Law and Judgment \[9/16/94\]](#)

KEY WORDS: *SUBSEQUENT INJURIES, *SUCCESSIVE INJURIES, *MAXIMUM HEALING, *COSTS, *PROOF OF MEDICAL ISSUES.

First insurer (State Fund) liable for low-back injury at L5-S1 where claimant did not reach

maximum medical healing prior to second injury covered by second insurer (Aetna).

JAMES D. LARSON v. BARRY SMITH LOGGING, INC.

WCC No. 9307-6807

Larson v. Barry Smith Logging, 267 Mont. 444, 884 P.2d 786 (1994) **AFFIRMED 11/14/95.**

KEY WORDS: *39-71-603, *NOTICE, *28-10-103

Evidence does not support claimant's argument that co-worker was his *ostensible supervisor*. The statute does not allow for "substantial compliance, nor does claimant convince the court that he did not realize the severity of his injury until after the 30 day notice period had passed.

CURT DAVID v. STATE FUND

WCC No. 9311-6955

David v. Mike McCoy, 267 Mont. 435, 884 P.2d 778 (1994). **AFFIRMED 11/14/95.**

KEY WORDS: *WAGES, *39-71-123(1991), *EMPLOYEE

[Findings of Fact, Conclusions of Law and Judgment \[3/18/94\]](#)

KEY WORDS: *WAGES, *39-71-123.

WCC approves State Fund calculation of weekly wage based on 39-71-123(3)(a). Hired for one day, therefore hourly rate x number of hours in a week hired to work. Did not allow consideration of prospective earnings, nor earnings as a private contractor for which he may not have insured himself for comp.

BRIAN WRAY v. STATE FUND

WCC No. 9212-6666

[Judgment Upon Remittitur \[11/10/94\]](#)

KEY WORDS: *LUMP SUM, *RECOUPMENT, *REMAND, *TEMPORARY TOTAL.

Wray v. State Fund, 266 Mont. 219, 879 P.2d 725 (1994) **REVERSED AND REMANDED 8/16/94.** WCC enters Judgment in accordance with Supreme Court decision holding that insurer was not entitled to recoup three lump sum advances from claimant's temporary total disability benefits. Claimant's request that the judgment prohibit recoupment from "current benefits" denied since benefits could have changed to permanent total and the Supreme Court decision only addresses temporary total benefits.

WAYNE FRANCETICH v. STATE FUND/DICK'S CONOCO

WCC No. 9610-5978

[Order Denying Attorney Fees and Costs \[11/09/94\]](#)

KEY WORDS: *ATTORNEY FEES, *CONSTITUTIONALITY.

Attorney fees denied after claimant successfully appealed and persuaded Supreme Court that subrogation statute was unconstitutional. Award of fee required finding that respondent's defense of the statute was unreasonable: it was not.

KRYSTYNA KRZAN v. STATE FUND

WCC No. 9405-7058

[Order on Appeal \[11/4/94\]](#)

KEY WORDS: *ABUSE OF DISCRETION, *CLEARLY ERRONEOUS, *CREDIBILITY, *OCCUPATIONAL DISEASE, *OCCUPATIONAL DISEASE MEDICAL PANEL, *SUFFICIENCY OF EVIDENCE, *VARICOSE VEINS.

Evidence supported hearing examiner's decision finding that claimant's varicose veins were not an occupational disease. DLI decision affirmed.

JACK W. BATEMAN v. BUTTREY FOODS & DRUG

WCC No. 9408-7125

[Order Denying Motion to Dismiss Emergency Petition \[11/3/94\]](#)

KEY WORDS: *DISMISSAL, *EMERGENCY PETITION, *MEDIATION, *MOTION TO DISMISS, *MOOTNESS.

Dismissal of emergency petition unwarranted even though no emergency; remedy is to put case on regular trial docket. Failure to mediate moot where mediation occurred by the time the motion to dismiss was submitted for decision.

THOMAS H. MILLS v. AMERICAN STORES CO.

WCC No. 9401-6976

[Order Granting Attorney Fees and Costs \[11/3/94\]](#)

KEY WORDS: *ATTORNEY FEES.

Attorney adequately established his customary and current hourly rate by affidavit and examples of client engagement letters but hours reduced from \$100 to \$75 based on the nature and complexity of the case. Claimant prevailed even though he got less than what was requested where award exceeded offers.

[Findings of Fact, Conclusions of Law and Judgment \[8/1/94\]](#)

KEY WORDS: *PPD, *LOST EARNING CAPACITY.

Bench ruling resulted in claimant being awarded PPD benefits. Best measure of claimant's post injury earning capacity is that of a school teacher.

STATE FUND v. DONALD E. CHAPMAN AND RICHARD J. PYFER

WCC No. 9201-6543

On January 11, 1995 the WCC entered its JUDGMENT ON REMAND, dismissing the State Fund's petition.

State Compensation Ins. Fund v. Donald E. Chapman and Richard J. Pyfer, 267 Mont. 484, 885 P.2d 407 (1994) **REVERSED AND REMANDED, 10/27/94.**

KEY WORDS: *ATTORNEY FEES, *JURISDICTION, *RULE 60(b)(2), *FRAUD

Issue on appeal: Did the WCC have authority to set aside its previous judgment and order claimant's attorney to repay attorney fees and costs? WCC has no authority in this case to set aside its judgment entered 18 months prior to the petition requesting that result. SC looks to Rules of Civil Procedure 60(b)(2).

Brief discussion of fraud.

[Opinion & Order on Pyfer's Request for Rehearing; Opinion & Order on Chapman's Request for Rehearing \[12/9/93\]](#)

KEY WORDS: *JUDGE LARSON, *NEW TRIAL, *JURISDICTION, *RULE 60(B)(6).

Judge Larson. Motion for rehearing **denied**. WCC had jurisdiction, no new ground or authority on which to base a reversal or reconsideration of 9/1/93 Order. Other arguments outside the statutory grounds for rehearing. Larson did not change mind after review of brief received after first order was issued. *Chapman v. Research Cottrell*, 259 Mont. 329, 856 P.2d 234 (1993).

CITY OF GREAT FALLS/ALEXSIS v. TARA DAMON

WCC No. 9407-7102

[Decision and Order on Appeal \[10/26/94\]](#)

KEY WORDS: *OPTION (C), *REHABILITATION PANEL, *REHABILITATION OPTIONS,

*39-71-1012.

Hearing examiner's decision reversing option (c) recommendation of Rehab Panel affirmed where option (c) jobs were incompatible with the physical restrictions imposed on claimant by her physician.

DONALD T. ROBINSON v. STATE FUND

WCC No. 9309-6898

Robinson v. State Compensation Mutual Insurance Fund, Slip Op. 94-532. **AFFIRMED - NONCITEABLE.**

[Findings of Fact, Conclusions of Law and Judgement](#) [10/14/94]

KEY WORDS: *ACCIDENT, *AGGRAVATION, *CREDIBILITY, *SUBSEQUENT INJURY.

Claimant failed to convince the Court that he suffered an aggravation of his preexisting back condition while working on a ladder. His testimony concerning the accident was not credible. He also failed to persuade the Court that his condition after the alleged accident was in any way different than before.

SCOTT DAVIS v. MMIA
WCC No. 9310-6908

[Findings of Fact, Conclusions of Law and Judgment](#) [10/7/94]

KEY WORDS: *CREDIBILITY, *NOTICE TO EMPLOYER, *39-71-603.

Claim for compensation denied where claim was not timely submitted to the employer within 30 days and he did not suffer an industrial accident. Present condition determined to be product of prior injury and condition. Credibility issue decisive and claimant determined not to be credible.

SOUND ADVICE HEARING v. CIGNA
WCC No. 9404-7040

Sound Advice Hearing v. Cigna, Slip Op. 94-485, **AFFIRMED - NONCITEABLE.**

[Decision and Order on Appeal](#) [9/26/94]

KEY WORDS: *HEARING AID, *HEARING AID DISPENSER, *JURISDICTION, *MEDICAL PAYMENTS, *39-71-704(6), *24.29.1404.

Department of Labor has jurisdiction to hear payment disputes between insurer and hearing aide dispenser. Sections 39-71-704(6), MCA and ARM 24.29.1401 construed.

ROSALIE WARBOYS v. EMPLOYERS INSURANCE OF WAUSAU
WCC No. 9307-6861

[Findings of Fact, Conclusions of Law and Judgment](#) [9/22/94]

KEY WORDS: *CAUSATION, *LOST EARNING CAPACITY, *PROXIMATE CAUSE, *SUBSEQUENT INJURY, *39-71-703(1985).

Claimant entitled to full compensation for lost earning capacity even though she returned

to her time-of-injury job and lost no wages but where she would not have been physically able to obtain an equivalent, high-paying job on the open labor market. Claimant's entitlement is not affected by subsequent, more disabling injury. *Reever*s applied.

JAMES HEDGER v. MT. SCHOOLS GROUP AUTHORITY

WCC No. 9209-6584

[Order for Independent Psychological Evaluation \[9/16/94\]](#)

KEY WORDS: *WORKERS' COMPENSATION, *INDEPENDENT MEDICAL
*EXAMINATION, *RES JUDICATA, *CHANGE IN CONDITION, *39-71-605,
*39-71-2909.

Request for further medical examination of permanently totally disabled claimant granted. Exam appropriate to determine possible treatment program which might render claimant employable. Court review of previously adjudicated disability status appropriate only where there is a change in disability.

LORRAINE ANDERSON v. UEF

WCC No. 9304-6771

DISMISSED WITHOUT PREJUDICE 4/5/95.

[Findings of Fact, Conclusions of Law and Judgment \[9/16/94\]](#)

KEY WORDS: *UNINSURED EMPLOYERS' FUND, *JURISDICTION,
*NATIVE AMERICANS, *INDIANS.

Tribal member doing business outside of Indian Reservation is subject to Montana's workers' compensation insurance coverage requirement. Uninsured Employers' Fund liable for benefits for work-related death of employee of uninsured tribal member.

GRENZ v. FIRE AND CASUALTY

WCC No. 9408-7130

[Order Denying Motion to Stay Proceedings & Dismissing Appeal \[9/14/94\]](#)

KEY WORDS: *JURISDICTION, *INTERVENTION, *DLI, *2-4-701.

WCC lacks jurisdiction to intervene in proceeding before the DLI. Per 2-4-701 a final agency decision must be rendered before WCC can step in

FRANK H. WHITE v. LUMBERMEN'S

WCC No. 9406-7069

DISMISSED 10/12/94.

[Order Dismissing Appeal \[9/8/94\]](#)

KEY WORDS: *INDEPENDENT MEDICAL EXAMINATION, *OCCUPATIONAL DISEASE,

*OCCUPATIONAL DISEASE MEDICAL PANEL, *39-72-607.

In connection with a contested case hearing concerning whether the claimant suffered from an occupational disease, the insurer is entitled to an independent medical examination by a physician who is not a member of the Montana Occupational Disease Medical Panel. Section 39-71-607, MCA, interpreted.

THOMAS J. DAVIS v. LIBERTY NORTHWEST INS.

WCC No. 9312-6974

[Decision and Judgment \[9/6/94\]](#)

KEY WORDS: *APPORTIONMENT, *OCCUPATIONAL DISEASE.

Apportionment of medical benefits under the Occupational Disease Act.

MICHAEL S. BOHMER v. UNINSURED EMPLOYER'S FUND

WCC No. 9311-6933

Bohmer v. Uninsured Employers Fund, 266 Mont. 289, 880 P.2d 816 (1994). **AFFIRMED 9/2/94.**

KEY WORDS: *DISTRICT COURT, *39-71-2905, *39-71-515, *39-71-516,
*JURISDICTION, *STATUTORY INTERPRETATION

Supreme Court concludes that WCC's ultimate decision is correct in spite of disagreement over WCC's interpretation of §39-71-2905 as it relates to §39-71-516.

[Order Dismissing Petition \[1/21/94\]](#)

KEYWORDS: *JURISDICTION, *39-71-515.

WCC does not have jurisdiction at this time to determine benefit issue. Issue is properly before district court per section 39-71-515, MCA. No concurrent jurisdiction.

LINDA WARBURTON v. STATE FUND

WCC No. 9401-6985

[Decision and Order on Appeal \[8/26/94\]](#)

KEY WORDS: *OPTION B, *REHABILITATION PANEL, *MEDICAL OPINION,
*CREDIBILITY, *TELEPHONE TESTIMONY, *JUDICIAL REVIEW, *CLEARLY
ERRONEOUS.

Reversed Department of Labor in finding that option "b" most appropriate return to work

option. Claimant testified by telephone and credibility at issue. Disability not merely a medical determination. The claimant had attempted to return to work and testified she could not do the job. MD's are not the final arbiters in determining a worker's ability to return to work.

DALE WOOD v. STATE FUND

WCC No. 9310-6924

Wood v. Pierce's Dodge City, Slip Op. 94-473, **AFFIRMED - NONCITEABLE** .

[Findings of Fact, Conclusions of Law and Judgment \[8/24/94\]](#)

KEY WORDS: *39-71-702(1) 1991, *39-71-116(15) 1991, *AGGRAVATION, *BURDEN OF PROOF, *CAUSATION, *MEDICAL OPINION.

Claimant suffers from degenerative disk disease, settled first injury and was reinjured on July 29, 1992. Court found he did not meet definition of PTD or PPD as causation was not proved. Insurer not liable for PTD when claimant suffers a temporary aggravation of preexisting condition. Also, no permanent disability as result of second injury.

STEVE WOOD v. MONTANA SCHOOL GROUPS INS. AUTHORITY

WCC No. 9401-6986

[Order Granting Partial Summary Judgment \[8/12/94\]](#)

KEY WORDS: *SUMMARY JUDGMENT, *WAGES, *COLLATERAL ESTOPPEL, *MARTELLI, *JURISDICTION, *REHABILITATION PANEL.

Granted partial summary judgment. Wages as defined in section 39-71-123, MCA. No repealer or prior precedents, *Lamping* (8/25/93) stands. Claimant collaterally estopped from relitigating issues, see *Martelli* (1993). Rejected argument of claimant that not estopped because rehabilitation procedures have been repealed. WCC governed by contract principles, date of injury. *Downam* (May 1, 1992)

JAMES VOSSLER v. LUMBERMENS MUTUAL CASUALTY

WCC No. 9310-6914

Vossler v. Lumbermens Mutual Casualty, Slip Op. 94-435, **AFFIRMED - NONCITEABLE** .

[Findings of Fact, Conclusions of Law and Judgment \[8/10/94\]](#)

KEY WORDS: *MEDICAL OPINIONS, *PSYCHOLOGICAL CONDITIONS, *FACTITIOUS DISORDER, *BURDEN OF PROOF, *CREDIBILITY, *EXPERT WITNESS.

Claimant fails to establish necessary nexus between his mental condition and his

accident. TTD and psychotherapy bills denied. Claimant not a credible witness. Dr. Veraldi concluded claimant was malingering or suffering from a factitious disorder.

MARY L. PEDERSEN v. STATE FUND

WCC No. 9401-6977

[Decision and Order on Appeal \[8/8/94\]](#)

KEY WORDS: *REHABILITATION PANEL, *OPTION "C", *INTERIM ORDER, *EVIDENCE, *JUDICIAL REVIEW, *ABUSE OF DISCRETION, *RECOUPMENT, *VOCATIONAL TESTIMONY.

DLI affirmed in its determination for "option c" rehabilitation. Reversed an "Interim Order" which had reinstated rehabilitation benefits. Claimant must repay benefits received as a result of the interim order. Rehabilitation testimony not helpful.

AMERICAN STORES, d/b/a BUTTREY FOOD v. MARGIE REAP

WCC No. 9312-6967

[Decision and Order on Appeal \[8/8/94\]](#)

KEY WORDS: *STATUTE OF LIMITATIONS, *39-71-601, *OCCUPATIONAL DISEASE, *EVIDENCE, *PRETRIAL.

Affirmed DLI order granting claimant a waiver to file claim for compensation. Allowed because claimant relied on her doctor who said her problem was the result of carpal tunnel, when it was actually a herniated disk. Employer's failure to object to erroneous statement in PRETRIAL ORDER at the time of the pretrial conference resulted in objection being waived.

CINDY L. HILL v. STATE FUND

WCC No. 9407-7086

[Order Dismissing Without Prejudice \[7/26/94\]](#)

KEY WORDS: *MEDIATION, *DISMISSAL.

Dismissed petition w/o prejudice. Failure to mediate.

GREGORY S. BUCKENTIN V. STATE FUND

WCC No. 9305-6790

Buckentin v. State Fund, 265 Mont. 518, 878 P.2d 262 (1994) **AFFIRMED 7/12/94.**

KEY WORDS: *39-71-603, NOTICE,

Claimant failed to notify employer within the 30 days as required by 603 (1991) and is not entitled to benefits. *Bodily*, 250 Mont. 274, does not apply

WALTER J. CASAROTTO v. M MIA
WCC No. 9308-6870

DISMISSED 10/3/94.

[Order Awarding Costs](#)

[Findings of Fact, Conclusions of Law and Judgment \[7/8/94\]](#)

KEY WORDS: *PPD, *39-71-703 (1991), *39-71-116915), *INJURY.

Claimant granted PPD for 31.5 weeks. Impairment was reflected in claimant's inability to work extra hours and to do shift work.

IN THE MATTER OF RONALD GENE COLE v. UEF
WCC No. 9311-6936

[Order & Judgment Dismissing Petition With Prejudice \[7/7/94\]](#)

KEY WORDS: *DISMISSAL, *SANCTIONS

Claimant did not respond to Court's April 13, 1994 Order which warned of dismissal. Judgment was entered in favor of the employer and the claimant's petition dismissed with prejudice.

[Order Granting Sanctions & Compelling Discovery \[4/13/94\]](#)

KEY WORDS: *SANCTIONS, *DISMISSAL, *DISCOVERY.

Claimant is sanctioned and ordered to respond to requests for written discovery and

STATE FUND v. MARK ALLEN PETERSON
WCC No. 9404-7039

[Order on Appeal \[7/5/94\]](#)

KEY WORDS: *OPTION C, *REHABILITATION PANEL, *STATUTORY
CONSTRUCTION, *REHABILITATION BENEFITS.

The DLI is reversed in its order that rehabilitation benefits must be continued pending the issuance of a final order. Citing to *Russette* (1994) the Court will not insert its own conditions, etc., into a statute.

CARL FAHRENBRUCK v. MONTANA POWER
WCC No. 9307-6835

[Order Amending Conclusions of Law and Judgment](#)

[Findings of Fact, Conclusions of Law and Judgment \[6/23/94\]](#)

KEY WORDS: *PERMANENT PARTIAL DISABILITY, *WAGES, *39-71-709,
*ELECTION,
*LUND.

Claimant found to be 75% disabled. Applying *Lund (1994)* claimant can change his initial election of PPD benefits. Insufficient evidence to precisely determine overtime hours, so WCC uses formula for calculation of maximum benefits available.

STEVEN K. YAGER v. MONTANA SCHOOLS GROUP AUTHORITY
WCC No. 9308-6872

[Findings of Fact, Conclusions of Law and Judgment \[6/20/94\]](#)

KEY WORDS: *CREDIBILITY, *EXPERT TESTIMONY, *TTD, *INJURY, *PENALTY.

Employer signed report indicating no question about the accident and then hired a private detective to watch the claimant. Court finds preponderance of credible evidence establishes injury is compensable. Claimant had many inconsistencies in his story, so penalty denied.

[Order Denying Motion to Compel in Part; Order Granting Motion to Compel in Part \[4/7/94\]](#)

KEY WORDS: *INVESTIGATIVE REPORTS, *VIDEOTAPES, *WORK PRODUCT,
*PRIVATE INVESTIGATORS, *IN CAMERA, *WITNESSES, *DISCOVERY,
*PRIVILEGED MATERIAL, *MOTION TO COMPEL

Denied motion to compel reports of investigator, with exception of references within report to letters already provided and portions of report which were discussed at the deposition of individual who used the reports to refresh her memory.

[Order on Motion to Compel - - Supplemental Order on Motion to Compel \[3/14/94\]](#)

KEY WORDS: *INVESTIGATIVE REPORTS, *VIDEOTAPES, *WORK PRODUCT,
*PRIVATE INVESTIGATORS, *IN CAMERA, *WITNESSES, *DISCOVERY,
*PRIVILEGED MATERIAL, *MOTION TO COMPEL.

Work-product protection is extended to private investigators. A redacted copy of report must be produced for *in camera* inspection as the investigator is listed as a witness. Second investigator not a witness, ergo, not discoverable, but must submit for *in camera*. Second Order requires that deposition of individual who will use report to refresh her memory be submitted **identifying portions which require use of report.**

STATE FUND v. RONALD F. HILBIG
WCC No. 9302-6701

[Order Re: Discovery \[6/17/94\]](#)

KEY WORDS: *DISCOVERY, *JUDGE SHERLOCK, *VIDEOTAPES.

Court must balance need for fair trial with full disclosure in considering discovery of photographs and videotapes. Claimant should not be given opportunity to view the evidence and then conform his testimony. State Fund can depose witness and tapes will be turned over for review.

ROGER WIMBERLEY v. STATE FUND
WCC No. 9312-6958

DISMISSED WITH PREJUDICE - 7/28/94.

[Order Denying Petition for New Trial or Amendment](#)
[Order Granting Summary Judgment \[6/2/94\]](#)

KEY WORDS: *SUMMARY JUDGMENT, *39-71-744, *INCARCERATION,
*INDEMNITY BENEFITS (705).

Granted motion for summary judgment denying further indemnity benefits. Section 39-71-744, MCA, clearly limits benefits due to incarceration. Impairment award is disability compensation and is fixed for a specific time period. This period expired while claimant was in prison. On 6/23/94 court denied motion for new trial. Arguments are **again** deemed immaterial to ultimate decision.

SHARON McCOLLEY v. STATE FUND
WCC No. 9305-6800

McColley v. OMO Constr., Slip Op. 94-374, AFFIRMED - NONCITEABLE.

[Findings of Fact, Conclusions of Law and Judgment \[6/2/94\]](#)

KEY WORDS: *CREDIBILITY, *INJURY.

Claimant claimed to have suffered injury while working as a flagger and being "buffeted" about. Court finds her to be incredible.

WAYNE BLAYLOCK v. NATIONAL UNION of PITTSBURGH
WCC No. 9307-6827

[Findings of Fact, Conclusions of Law and Judgment \[6/1/94\]](#)

KEY WORDS: *PPD, *ATTORNEY FEES.

Old law injury, determination of PPD. Claimant injured left arm when it was pulled into a fan. Returned to work, without restrictions, but continued to experience pain and a loss of sensation in hand. 25% disability award, less already paid.

LARSON CATTLE COMPANY v. CHARLES T. KILLEBREW
WCC No. 9312-6968

[Decision and Order on Appeal \[5/25/94\]](#)

KEY WORDS: *39-71-603, *NOTICE, STATUTE OF LIMITATIONS, *RES JUDICATA, *JUDICIAL REVIEW, *CLEARLY ERRONEOUS.

This case had been remanded to the Department by the Supreme Court (*Killebrew v. Larson Cattle Company*, 254 Mont. 513, 839 P.2d 1260 (1992)) to resolve notice issue, which had to be determined based on the claimant's credibility. Claimant argued that on remand DLI hearing examiner did not use independent judgment. WCC affirmed DLI.

RUSSETTE, JR. V. CHIPPEWA CREE HOUSING AUTHORITY

WCC No. 9306-6811

Russette v. Chippewa Cree Housing Auth., 265 Mont. 90, 874 P.2d 1217 (1994)
REVERSED AND REMANDED 5/16/94

KEY WORDS: *39-71-710 (1987), *RETIREMENT, *STATUTORY CONSTRUCTION
*39-71-703 (1987)

Cannot construe Legislature's failure to amend 710 in 1991 as an oversight as urged by State Fund and found by the WCC. Claimant is entitled to permanent partial disability benefits after retirement.

[Decision and Order \[1/3/94\]](#)

KEY WORDS: *RETIREMENT, *39-71-703, *39-71-710

Case dealing with amendments to 39-71-710, -703, -711. WCC says that failure of legislature to revise -710 was an obvious oversight.

MARGARET KOBER v. BUTTREY FOODS

WCC No. 9311-6951

DISMISSED ON APPEAL 7/12/94

[Findings of Fact, Conclusions of Law and Judgment \[5/9/94\]](#)

KEY WORDS: *PENALTY, *AGGRAVATION, *MEDICAL OPINIONS, *CAUSATION,
*ATTORNEY FEES.

Case settled and issue was whether current back condition was result of injury or a preexisting condition. Buttrey's persisted in its denial of benefits based on unfounded legal theory and was ordered to pay the bills, plus a 20% penalty. Employer takes employee as is.

ANGELA CARMODY v. EMPLOYERS INS. OF WAUSAU

WCC No. 9302-6686

[Order on Costs](#)

[Findings of Fact, Conclusions of Law and Judgment \[5/6/94\]](#)

KEY WORDS: *AGGRAVATION, *39-71-606, *DEFENSES, *REHABILITATION BENEFITS, *PENALTY, *JOB POOL, *39-71-1011, *WAGE SUPPLEMENT BENEFITS.

Injury to knee results in entitlement to wage supplement benefits. Subsequent injuries to the knee considered aggravations. Insurer precluded from raising a defense which was not raised at time of pretrial. Job pool limited to Montana. Rehabilitation benefits denied. No penalty even though some of insurer's arguments went beyond the "pale of legitimate argument"

FRANK V. PISKOLICH v. ESIS, INC.
WCC No. 9403-7006

[Order Dismissing Without Prejudice \[5/5/94\]](#)

KEY WORDS: *PRO SÉ, *DISMISSAL

Dismissal without prejudice of a pro sé petition. Insurer's attorney had advised claimant to dismiss with prejudice. After explanation from Court of the ramifications of a **with** prejudice dismissal, claimant changed his mind and petition was dismissed without prejudice

DEAN THOMSON v. WAUSAU INS. CO.
WCC No. 9309-6880

[Findings of Fact and Conclusions of Law and Judgment \[4/22/94\]](#)

KEY WORDS: *DISABLED WORKER, *REHABILITATION BENEFITS, *BURDEN OF PROOF, *39-71-1011.

Claimant's request for rehabilitation benefits denied. Argued he was a disabled worker, but failed to carry burden of proof.

TOM HEBERT v UNINSURED EMPLOYERS' FUND
WCC No. 9309-6892

[Decision and Order on Appeal \[4/22/94\]](#)

KEY WORDS: *UNINSURED EMPLOYER, *PENALTY, *PREMIUMS, *JUDICIAL REVIEW, *ABUSE OF DISCRETION.

Affirmed DLI order imposing a penalty which was double the amount of unpaid premium for an employer that failed to provide workers' compensation coverage for its employees.

CRYSTAL TEMPEL v. NATIONAL UNION FIRE INS.

WCC No. 9311-6943

[Findings of Fact, Conclusions of Law and Judgment \[4/22/94\]](#)

KEY WORDS: *CREDIBILITY.

No work-related accident occurred, claimant is incredible.

MISCHELLE SCHELSKE v. LIBERTY MUTUAL

WCC No. 9310-6925

Schelske v. J.C. Penney, Slip Op. 94-231 **AFFIRMED - NONCITEABLE.**

[Findings of Fact, Conclusions of Law and Judgment \[4/21/94\]](#)

KEY WORDS: *MEDICAL OPINIONS, *MEDICAL PAYMENTS, *MEDIATION,
*OCCUPATIONAL DISEASE, *39-71-2401.

Claimant suffers from occupational disease and seeks reimbursement for expenses and medical costs which were not authorized. MD did not use independent medical judgment in when recommending a clinic to which claimant wanted to go. Will not consider bills not included in mediation.

WILLIAM GRENZ v. FIRE AND CASUALTY OF CONN.

WCC No. 9310-6922

[Decision on Appeal; Order Reversing & Remanding \[4/21/94\]](#)

KEY WORDS: *DISMISSAL, *OCCUPATIONAL DISEASE, *39-72-405, *MOTION TO DISMISS.

Reversed DLI decision which had dismissed Grenz' claim for occupational disease benefits without benefit of a hearing. Statute of limitations for OD is fundamentally different than for workers' compensation. DLI did not comply with procedural requirements.

depositions. Failure to respond results in dismissal of petition with prejudice.

WYLIE V. STATE COMPENSATION INSURANCE FUND

WCC No. 9212-6664

[Order Granting Summary Judgment; Judgment Dismissing the Petition with Prejudice \[4/19/94\]](#)

KEY WORDS: * SUMMARY JUDGMENT, *STRATEMEYER

Claimant admits in brief that his sole injury was "to his mind rather than his body." Further, claimant concedes that *Stratemyer* is controlling. Summary judgment granted.

VIVIAN OSTERMILLER v. AMERICAN STORES

WCC No. 9402-6996

[Order Granting Partial Summary Judgment; Order Delimiting Issues for Trial \[4/19/94\]](#)

KEY WORDS: *IME, *39-71-605, *SUMMARY JUDGMENT.

Claimant ordered to submit to an IME which must be scheduled at his convenience. Second IME is justified as expertise of the IME's is different. Application of 71-605(1991) [to be scheduled as close as practical to employee's residence] not proper as enacted after date of injury. Partial summary judgment granted as claimant defers claim for further benefits and issues are limited to proof of her claim for medical benefits.

[Order Compelling Attendance at IME; Order Denying Protective Order; Order Vacating Trial and Pretrial \[4/7/94\]](#)

HERBERT SHELLEY v. UNITED STATES FIDELITY & GUARANTY

WCC No. 9211-6628

Shelley v. United States Fidelity & Guaranty, Slip Op. 94-234. **AFFIRMED , NONCITEABLE .**

[Findings of Fact, Conclusions of Law and Judgment \[3/18/94\]](#)

KEY WORDS: *CHIROPRACTOR, *ARM 24.29.2004, *MAINTENANCE CARE, *MILEAGE, *BURDEN OF PROOF

Denied request for chiropractic treatments and mileage. Claimant had failed to get prior approval for treatments and the treatments were considered maintenance. Claimant failed to carry burden of proof that treatments were for original injury and is not entitled to mileage.

RICHARD BLOUNT v. CONAGRA, INC.

WCC No. 9304-6769

[Order Partially Denying Motion to Compel; Order Denying Motions for Sanctions \[3/16/94\]](#)

KEY WORDS: *ATTORNEY CLIENT, *WORK PRODUCT, *DISCOVERY, *SANCTIONS, *TAPE RECORDED STATEMENTS, *PRODUCTION, *MOTION TO COMPEL.

Denied production of documents from counsel for insurer, to employees of employer — considered work product. Denies production of documents prepared after insurer's attorney became involved — prepared in anticipation of litigation. Original of tape recorded statement of claimant must be produced. Hearing scheduled to discuss insurer's failure to produce entire file.

JOYCE RIDGEWAY SATHER v STATE FUND

WCC No. 9306-6821

[Decision and Order on Appeal \[3/14/94\]](#)

KEY WORDS: *REHABILITATION PANEL, *39-71-1011 (7)(A), * TYPICALLY AVAILABLE, *OPTION "C".

Affirmed DLI determination that option "c" was appropriate. Failure to obtain a job does not rebut this determination (her job search was self-defeating) and further, the job was typically available.

BRUCE BARNES v. STATE FUND

WCC No. 9210-6609

[Order Regarding Costs](#)

[Order Amending Findings of Fact, Conclusions of Law and Judgment \[3/14/94\]](#)

Corrected previous order which found that insurer **had or would** pay medical/dental when that was not the case. Directed insurer pay medical/dental bills.

[Order Adopting Findings of Fact, Conclusions of Law and Judgment \[1/26/94\]](#)

KEY WORDS: *CAUSATION, *MEDICAL BENEFITS, *EXPERT WITNESS TESTIMONY, *39-71-704.

Campbell case. Claimant's jaw condition, which needed attention two years after the industrial injury is related, and he is entitled to medicals and future temporary total disability, if and when he has surgery. No temporary total disability at time of injury as did not suffer "total loss of wages"

ROBERT KRAMLICH v. STATE FUND

WCC No. 9304-6773

[Decision and Order on Appeal \[3/10/94\]](#)

KEY WORDS: *REHABILITATION PANEL, *39-71-1012, *39-71-1017, *EVIDENCE, *DEPOSITION, *MEDICAL EVIDENCE, *OVERRULE/REVERSE PREVIOUS DECISION, *JUDICIAL REVIEW, *OPTION "C".

Reversed DLI as substantial evidence **did not** support hearing examiner's conclusion that claimant was an "option c." The depositions and medical testimony did not support approval of the job. Overruled WCC decisions in *George* (6170) and *Russell* (6469) and returned case to DLI for rehab panel to complete its work.

CRAIG A. ADELS v. CIGNA INS. CO

WCC No. 9397-6831

[Order Amending Prior Order Denying Motion to Compel \[3/10/94\]](#)

KEY WORDS: *PENALTY, *DISCOVERY, *WORK PRODUCT, *CLAIM FILES, *BIFURCATION, *RULE 26(B)(3), *MOTION TO COMPEL.

Extends protection or work-product doctrine to claim files. Attorney's involvement in case at time document generated puts them under work product. Amended ORDER, (3/10/94). Work product does not automatically extend to insurer's claim files. Must prove entitlement to benefits before penalty issue is considered. Bifurcate penalty, then if needed in camera review.

[Order Denying Motion to Compel; Order Bifurcating Issues](#)

[Order Compelling Discovery \[1/6/94\]](#)

KEY WORDS: *DISCOVERY, *MOTION TO COMPEL, *IN CAMERA/*INSPECTION, *ARM 24.5.324, *RULE 37(A).

Parties must follow proper procedure when seeking an order compelling discovery. *In camera* inspection will be done when properly requested.

BUD STRODE v. STATE FUND
WCC No . 9312-6975

[Order Granting Reconsideration; Order Granting Motion to Dismiss in Part; Order Denying Motion to Dismiss in Part \[3/9/94\]](#)

KEY WORDS: *DISMISSAL, *JURISDICTION, *EXHAUSTION OF REMEDIES, *ARM 24.5.316(4), *39-71-711, *IMPAIRMENT RATING, *RECONSIDERATION OF ORDER, *FAILURE TO RESPOND.

Petition dismissed due to claimant/petitioner's failure to respond to MOTION TO DISMISS. Motion granted due to claimant's failure to exhaust provisions of statute and nothing has been done regarding request for rehabilitation benefits. On 3/9/94 issued ORDER regarding reconsideration. Court accepts reason for failure to respond. Looking at -711 and significant financial penalty imposed if party is not satisfied, claimant properly invoked the Court's jurisdiction.

[Order Dismissing Petition \[2/22/94\]](#)

STATE FUND v. FRANK RICHTER
WCC No. 9308-6867

[Order Denying Summary Judgment \[3/4/94\]](#)

KEY WORDS: *SUMMARY JUDGMENT, *ATTORNEY FEES, *FRAUD, *STATUTE OF LIMITATIONS, *72-33-219, *CONSTRUCTIVE TRUST, *RECOUPMENT,

*RESTITUTION.

State Fund attempts to retrieve money paid for attorney fees in a case wherein after a Court decision finding for the claimant, she was convicted of fraud. Summary judgment denied to both parties. This is not an action for fraud. State Fund argues constructive trust and statute of limitations. State Fund was on notice early on, but facts are insufficient and summary judgment denied.

GARY D. MOTICHKA v. PLUM CREEK TIMBER

WCC No. 9303-6749

[Order Denying Motion for Summary Judgment \[3/4/94\]](#)

KEYWORDS: *COLLATERAL ESTOPPEL, *SUMMARY JUDGMENT,
*OCCUPATIONAL DISEASE, *JURISDICTION, *39-72-706, *MARTELLI,
*ELECTION OF REMEDIES, *CAUSATION, *AGGRAVATION.

Insurer seeks to invoke the doctrine of collateral estoppel based on DLI record. Cannot find with certainty that DLI finding regarding apportionment of 39-72-706 is the same as a determination under the WC Act and that claimant's condition is not attributable to injury.

THOMAS C. CISKE v. LIBERTY NORTHWEST INS.

WCC No. 9312-6960

[Order Denying Motion for Summary Judgment \[2/24/94\]](#)

KEY WORDS: *SUMMARY JUDGMENT.

Sufficient dispute exists to deny motion for summary judgment. Summary judgments are not favored.

RUSSELL PAULSEN v. ENTECH, INC

WCC No. 9209-6591

AFFIRMED 12/1/1994, Slip Op. 94-135, NONCITEABLE .

[Findings of Fact, Conclusions of Law and Judgment \[2/22/94\]](#)

KEY WORDS: *PENALTY, *ATTORNEY FEES, *UNREASONABLE DELAY,
*39-71-611(1989)

Penalty and attorney fees denied. WCC refuses to expand *Handlos* (1990) At mediation insurer accepted liability but then failed to pay. Claim not adjudged compensable by the WCC. Unreasonable delay in acceptance and payment after mediation, but long before trial, did not entitle claimant to penalty and fees.

[Order Denying Petitioner's Motion for New Trial; Denying Motion to Strike; Denying Motion](#)

[for a Different Judge \[1/3/94\]](#)

KEYWORDS: *RECUSAL, *NEW TRIAL.

Motions for 1) new trial, 2) to strike, and 3) a different judge were denied as premature. Case will be decided on evidence admitted at trial.

GARY D. MOTICHKA v. PLUM CREEK TIMBER CO.

WCC No. 9301-6685

DISMISSED 6/29/94.

[Decision and Order on Appeal \[2/14/94\]](#)

KEY WORDS: *OCCUPATIONAL DISEASE, *APPORTIONMENT, *39-72-702, *39-72-602, *39-72-706, *EVIDENCE.

DLI affirmed in its apportionment of disability under the occupational disease act, as it logically followed the hearing examiner's findings of fact. Approved consideration of non-work-related injuries.

[Decision and Order on Motion to Reconsider \[9/30/93\]](#)

RANDY HEINRICH v. MONTANA MUNICIPAL INS. AUTHORITY

WCC No. 9303-6740

[Order Granting Partial Summary Judgment \[2/11/94\]](#)

KEY WORDS: *SUMMARY JUDGMENT, *VACATION AND SICK LEAVE, *REIMBURSEMENT, *39-71-736(2), *JURISDICTION, *PENALTY.

No jurisdiction to order reimbursement of vacation and sick leave time allegedly used because claimant was denied TTD. **OVERRULED** WCC's previous order in *Redman v. City of Laurel*, WCC No. 8811-4946 which required payment of penalty on amount necessary to repurchase sick leave. Insurer may be estopped from protection of section 39-71-736(2), MCA.

GORDON C. COLLINS v. STATE COMPENSATION INSURANCE FUND

WCC No. 9305-6801

[Decision and Order Granting Summary Judgment \[2/3/94\]](#)

KEY WORDS: *MENTAL STRESS, *PSYCHOLOGICAL CONDITION, *INJURY, *SUMMARY JUDGMENT, *39-71-119, *STRATEMEYER.

Summary judgment granted to State Fund. Claimant was initially shot at during robbery and later was the victim of a prank robbery. He claimed emotional distress. His injuries were inconsequential, and do not meet the definition of injury. Discusses *Stratemeyer*.

LIVESAY V. NATLSCO/KEMPER
WCC No. 9210-6615

[Order Adopting Findings of Fact and Conclusions of Law of Hearing Examiner and Entering Judgment \[1/28/94\]](#)

KEY WORDS: *ATTORNEY FEES

Worker's comp benefits were paid or conceded prior to commencement of any action in Court. Insurer's actions were reasonable.

TED CHAFFEY v. LIBERTY MUTUAL FIRE INS.
WCC. No. 9211-6627

[Order Awarding Costs \[3/8/94\]](#)

[Order Adopting Findings of Fact, Conclusions of Law and Judgment \[1/25/94\]](#)

KEY WORDS: *39-71-703(1989), *CAUSATION, *WAGE SUPPLEMENT BENEFITS, *39-71-105(1987), *WAGES.

After injury claimant could only work 45 hours a week and not prior average of 55 hours. Injury diminished wages claimant qualified to earn in job pool. If actual hours are used in calculation preinjury, they must also be used in post-injury calculations.

CONNECTICUT INDEMNITY v. BRENDA NERPEL
WCC No. 9206-6464

[Order Denying Respondents Motion to Expand Issues \[1/3/94\]](#)

KEY WORDS: *EXPAND THE ISSUES, *OCCUPATIONAL DISEASE, *JURISDICTION.

Respondent/claimant's motion to expand the issues is denied due to failure to show good cause. A new trial had been granted and new issue, which is occupational disease, is totally unrelated to initial pleading. Primary jurisdiction is with DLI.

[Order Denying Motion to Reconsider; Order Granting New trial \[10/29/93\]](#)

WILLIAM CHAGNON v. TRAVELERS, INS. CO.
WCC No. 9007-5883

[Order Re: Discovery \[12/30/93\]](#)

KEY WORDS: *INTERROGATORIES, *MOTION TO COMPEL, *ATTORNEY FEES, *PALMER V. FARMERS.

Insurer's objections to interrogatories have no substantial basis. Specifically objection that petitioner is seeking "mental impression" is merit less. Interrogatories sought to clarify

insurer's objections.

[Order on Motion to Compel or Dismiss \[10/29/93\]](#)

MICHALINE MARKS v. STATE FUND

WCC No. 9306-6818

[Order Compelling Deposition & for Sanctions \[12/28/93\]](#)

KEYWORDS: *SANCTIONS, *DEPOSITION, *FAILURE TO APPEAR.

Claimant failed to appear for deposition on two occasions and did not notify respondent's attorney. Sanctioned \$100.

DARRELL HONEYCUTT v. STATE FUND

WCC No. 9310-6913

[Order Granting Summary Judgment; Order Dismissing Petition \[12/13/93\]](#)

KEY WORDS: *DISMISSAL, *MEDIATION, *STANDING, *SANCTIONS, *39-71-2914, *SUMMARY JUDGMENT.

Petition dismissed for failure to mediate and on grounds that claimant lacks standing. Sanctions denied, but counsel have an obligation to ensure the pleadings are accurate and factual.

LELAND J. LEWIS v. STATE FUND

WCC No. 9302-6692

[Order Denying Motion For Reconsideration \[12/1/93\]](#)

KEYWORDS: *NEW TRIAL, *STATUTE OF LIMITATIONS.

Claimant/appellant fails to persuade Court initial ORDER ON APPEAL was erroneous. Deadline cannot be extended for filing of claim and claimant should have recognized the nature — compensable nature of his claim.